CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 203

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

ESTATE OF HARRY HOLMES, DECEASED, LUCY B. HOLMES, INDEPENDENT EXECUTRIX

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 6, 1945

CERTIORARI GRANTED OCTOBER 8, 1945

SUPREME COURT OF THE UNITED STATES

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A [Caption omitted.]

2 In the Tax Court of the United States

Docket No. 2943

ESTATE OF HARRY HOLMES, DECEASED, LUCY B. HOLMES, INDEPENDENT EXECUTRIX, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Appearances: For Taxpayer: J. E. Price, Esq. For Comm'r: Frank B. Schlosser, Esq.

Docket Entries

1943

Sept. 17—Petition received and filed. Taxpayer notified. Fee Paid.
Sept. 18—Copy of petition served on General Counsel.
Oct. 12—Agreed motion to place on Galveston, Texas, Calendar, Oct. 25, 1943, filed.
Oct. 13—Answer filed by General Counsel.
Oct. 13—Request for hearing in Houston, Texas, filed by General Counsel.
Oct. 14—Motion of October 12, 1943 granted.
Oct. 14—Copy of answer and request served on taxpayer. (Galveston, Texas)
Oct. 14—Hearing set October 25, 1943—Galveston, Texas.
Oct. 25—Hearing had before Judge Black on merits. Submitted. Stipulation of facts and exhibits attached thereto. Petitioner's brief due 1/2/44. Respondent's reply brief 2/2/44. Petitioner's reply brief due 2/17/44.
Nov. 30—Transcript of hearing 10/25/43 filed.
3 Dec. 30—Motion for extension to 2/1/44 to file petitioner's brief, 3/3/44 to file respondent's brief and 3/18/44 to file petitioner's reply brief, filed by taxpayer. Granted.

1944

Jan. 29—Brief filed by taxpayer. (1) Copies rec'd 1/31/44.
Feb. 19—Reply brief filed by General Counsel. Served 2/21/44.
Mar. 14—Reply brief filed by taxpayer.
Apr. 5—Opinion rendered. Judge Black. Div. 15. Decision will be entered under Rule 50. 4/5/44. Copy served.
May 1—Computation of deficiency filed by General Counsel.
May 3—Hearing set May 31, 1944 on settlement.

May 11—Consent to settlement filed by taxpayer.
May 13—Decision entered. Judge Black. Div. 15.
Aug. 2—Petition for review by U. S. Circuit Court of Appeals, 5th Circuit, with assignments of error filed by General Counsel.
Aug. 14—Proof of service filed by General Counsel on attorney.
Aug. 14—Proof of service filed by General Counsel on Executrix.
Oct. 2—Certified copy of order from 5th Circuit extending the time to 11/30/44 to prepare and transmit the record filed.
Nov. 13—Praecipe for record filed by General Counsel with proof of service thereon.

[File Endorsement Omitted.]

4 In the Tax Court of the United States

Docket No. 2943

ESTATE OF HARRY HOLMES, DECEASED, LUCY B. HOLMES, INDEPENDENT EXECUTRIX, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition

Filed Sept. 17, 1943

I

The Petitioner is a citizen of the City of Houston, State of Texas, now residing at 2315 Dryden Road, but formerly residing at 1415 East Alabama Street, in said City and State. Harry Holmes died testate in Houston, Texas, on October 5, 1940, leaving his wife, Lucy B. Holmes, sole devisee and Independent Executrix of his Estate, and she is now the duly qualified and acting Independent Executrix of said Estate. The Estate Tax Returns for the Estate of Harry Holmes, deceased, were duly and timely filed with the Collector for the First District of Texas, located at Austin, Texas.

II

The notice of deficiency was mailed to Petitioner on July 3rd, 1943; a copy of which notice is attached hereto marked "Exhibit A."

5

III

The taxes in controversy are Estate Taxes on the one-half community interest on the Estate of Harry Holmes in the amount of Thirteen Thousand, Four Hundred Ninety-one and 38/100 ($13,491.38) Dollars, from which will be deducted as Taxes State Inheritance Taxes the sum of $685.96, as corrected and paid on July 30, 1942, as per photostatic copy of Receipt attached hereto marked "Exhibit B."

IV

(a) The Commissioner erred in his determination of the additional tax set forth in the notice of deficiency in holding "pursuant to the provisions of Section 811 (d) of the Internal Revenue Code" "the transfers made by the decedent to a trust executed under date of January 20, 1935, for the benefit of his three sons and certain other contingent beneficiaries, are properly includible in the gross estate of the decedent, that is to the extent of the decedent's community property interest therein."

(b) The Commissioner erred in holding that the Decedent's community property interest in said trusts were includible in Decedent's gross estate.

V

Decedent, Harry Holmes, died testate on October 5, 1940, and left surviving him his wife, Lucy B. Holmes, as sole devisee and Independent Executrix of his estate, and she is now the duly qualified and acting Independent Executrix of said estate; also, three sons: Harry Holmes, Jr., twenty-seven (27) years of age, a single man; John B. Holmes, twenty-four (24) years of age, a married man; and Thomas J. Holmes, nineteen (19) years of age, a single man whose disabilities were removed on the 31st day of December 1940. The said Harry Holmes, on the 20th day of January 1935, made, executed and delivered an instrument which he signed "Harry Holmes, Grantor and Trustee" in which he created three (3) trusts in favor of his three above men-

6 tioned sons. In this trusts instrument he conveyed to Harry Holmes, Trustee, and to Successor Trustee provided for, ten (10) shares of stock in the Quintana Petroleum Company, a corporation, for each of said three sons. This corporation was thereafter liquidated and the prorata part of the corporation's assets conveyed to Harry Holmes, Trustee, under and by virtue of the above mentioned trusts instrument. The basis of the additional tax is that the transfers made by the Decedent in the Trusts Instrument of date January 20, 1935, for the benefit of his three sons, and other contingent beneficiaries in the event

of their death, are includible in the gross estate of the Decedent to the extent of the value of his one-half (½) community property interest in the trust property at the date of Decedent's death.

Wherefore, petitioner prays that this Honorable Court hear this proceeding and set aside the asserted deficiency for Estate Taxes for the year 1940 on the Estate of Petitioner herein; and Petitioner prays for all other and further relief to which Petitioner may be entitled.

ESTATE OF HARRY HOLMES,
DECEASED,
By LUCY B. HOLMES,
LUCY B. HOLMES,
Independent Executrix.

Mailing address—13th Floor Sterling Building.

J. E. PRICE,
J. E. PRICE,
Counsel for Petitioner.

Mailing address—13th Floor Sterling Building, Houston, Texas.

7 *Exhibit B to petition.*

Received No. 2 July 31, 1942.
The Comptroller of Public Accounts.

This duplicate and stub must be forwarded to Comptroller.

DUPLICATE

No. 7—$685.96

Inheritance Tax Receipt—State of Texas, Harris County, Texas

Received from Mrs. Lucy B. Holmes Six Hundred eighty-five and 96/100 Dollars, in payment of Inheritance Tax on the sum of Seventy-one Thousand Seven Hundred Ninety-seven and 89/100 Dollars, inherited by Lucy B. Holmes from the Estate of Harry Holmes, Deceased, July 30th, 1942.

[SEAL]

JIM H. GLASS,
Tax Collector.
R. DUERER,
Dpty.

Countersigned
TED H. SHEPPERD,
Comptroller of Public Accounts.

8 *Exhibit A to petition*

Form 1236—SN–ET–1

TREASURY DEPARTMENT,
INTERNAL REVENUE SERVICE,
Dallas 1, Texas, July 3, 1943.

Office of Internal Revenue Agent, In Charge Dallas Division.
MT–ET–Dist. of First Texas, Estate of Harry Holmes. Date of death: October 5, 1940.

ESTATE OF HARRY HOLMES, Deceased,
Lucy B. Holmes, Independent Executrix,
1415 East Alabama Street, Houston, Texas.

MADAM: You are advised that the determination of the estate-tax liability of the above-named estate, discloses a deficiency of $13,491.38, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Dallas 1, Texas for the attention of MT–ET–HGB. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the de-
9 ficiency and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully.

GUY T. HELVERING,
Commissioner,
By (Signed) E. A. PEAVY,
Acting Internal Revenue Agent in Charge.

HGB: td.
Enclosures:
Statement.
Form or waiver.

10 MT–ET.

District of First Texas.
Estate of Harry Holmes.
Date of Death: October 5, 1940.

STATEMENT

Estate tax—Liability, $15,001.12; assessed, $1,509.74; deficiency, $13,491.38.

In making the determination of the Federal estate tax liability of the above-named estate, careful consideration has been given to the report of examination dated October 21, 1942, to the protest dated December 9, 1942, and to statements made at the conference held on January 8, 1943.

ADJUSTMENTS TO NET ESTATE

Net estate for basic tax as disclosed by return		($58,497.24)
Additions to value of net estate and decrease in deductions:		
Real Estate	$28,740.63	
Stocks and Bonds	135.00	
Other miscellaneous property	250.00	
Transfers	91,593.17	
Funeral Expenses	987.50	
Executor's Commissions	500.00	
Miscellaneous Administration Expenses	40.26	122,246.56
Net estate for basic tax as adjusted		63,749.32
Net estate for additional tax as disclosed by return		1,502.76
Additions to value of net estate and decrease in deductions:		
Real Estate	$28,740.63	
Stocks and Bonds	135.00	
Other Miscellaneous Property	250.00	
Transfers	91,593.17	
Funeral Expenses	987.50	
Executor's Commission	500.00	
Miscellaneous Administration Expenses	40.26	
		122,246.56
Net estate for additional tax as adjusted		123,749.32

EXPLANATION OF ADJUSTMENTS

Schedule A—Real Estate

Item	Returned	Determined
1	$2,125.00	$3,500.00
2	1,260.00	2,116.00
4	10.00	200.00
9	150.00	300.00
10	45.00	90.00
11	225.00	449.00
13	225.00	600.00
14	25.00	125.00
15	375.00	500.00
16	362.50	750.00
17	50.00	362.50
18	5.00	10.00
20	350.00	370.00
21	15.62	25.00
22	100.00	200.00
23	5.00	17.50
24	250.00	625.00
25	200.00	300.00

EXPLANATION OF ADJUSTMENTS—Continued

Schedule A—Real Estate—Continued

	Returned	Determined
Item:		
26	$30.00	$60.00
27	1,662.50	2,375.00
29-31	37.50	90.00
32	280.00	560.00
33	592.00	1,776.00
34	80.00	100.00
12 35	160.00	326.50
36	91.50	305.00
37	96.00	320.00
38	48.00	160.00
39	48.00	160.00
41	15.00	32.00
42	5.00	52.00
43	50.00	100.00
48	152.50	265.80
49	19,972.70	30,000.00
50	8,205.12	12,500.00
52	8,407.48	11,000.00
53	2,551.16	2,600.00
54	3,044.06	3,800.00
55	2,671.22	3,250.00
56	2,591.94	3,250.00
57	1,629.60	2,500.00
58	1,178.37	1,200.00
59	2,942.22	3,000.00
60	3,970.00	4,000.00
62	924.08	1,000.00
63	144.98	150.00
64	246.61	375.00
65	150.00	200.00
66	146.31	150.00
67	30.00	25.00
89 (added)		256.30
Total	67,931.97	96,672.60

It is held that decedent's community interest in each and every item of property covered by item numbers as listed had fair market values at date of decedent's death as shown in "determined" column. Item 89 added covers decendent's community interest in a 40% interest in Block 58, Belt Junction City Addition, Harris County, Texas. This item not listed in return but held to be owned by decedent at the date of his death.

EXPLANATION OF ADJUSTMENTS

Schedule B—Stocks and Bonds

	Returned	Determined
Item:		
7	$250.00	$375.00
8	20.00	30.00

Item 7: It is held that the membership in the River Oaks Country Club had a fair market value at date of decedent's death of $750.00, the community interest of decedent a fair market value of $375.00.

Item 8: It is held that the 40% interest in one share of stock of the Houston Country Club had a fair market value at date of the decedent's death of $60.00, the community interest of decedent a fair market value of $30.00.

Schedule F—Other Miscellaneous Property

	Returned	Determined
Item 7—Added		$250.00

This item covers an undivided one-half interest in a judgment against one Nylon obtained in Brazoria County, Texas. It is held that the interest of the decedent in the judgment had a fair market value at date of decedent's death of $250.00.

Schedule G—Transfers

	Returned	Determined
Item 1		$91,593.17

Pursuant to the provisions of Section 811 (d) of the Internal Revenue Code, it is held that the transfers made by the decedent to a trust executed under date of January 20, 1935, for the benefit of his three sons and certain other contingent beneficiaries, are properly includible in the gross estate of the decedent, that is to the extent of the decedent's community property interest herein. The value of the transferred property includible in the gross estate is the value thereof at the date of decedent's death.

14 DEDUCTIONS

Schedule J-1—Funeral Expenses

	Determined	Returned
Item 1	$987.50	$1,975.00

This item covers certain claims of doctors aggregating $1,975.00 which are held to be deductible to the extent of the community half only.

Schedule J-3—Attorney's Fees

	Determined	Returned
Item 1	$500.00	$1,000.00

This item covers fees of attorneys paid in the amount of $1,000.00, but held to be deductible to the extent of the community half only.

Schedule J–4—Miscellaneous Administration Expenses

	Determined	Returned
Item 1	$40.25	$80.51

This item covers miscellaneous administration expenses paid in the sum of $80.51 but held to be deductible to the extent of the community half only.

COMPUTATION OF TAX

	Returned	Determined
Net estate for basic tax	None	$63,749.32
Net estate for additional tax	$1,502.76	123,749.32
1. Gross basic tax	0.00	774.99
2. Credit for gift tax	0.00	0.00
3. Gross basic tax less credit for gift tax	0.00	774.99
4. Credit for estate and inheritance taxes	0.06	0.00
5. Net basic tax	0.00	774.99
6. Total gross taxes (basic and additional)	30.06	13,637.38
7. Gross basic tax	0.00	774.99
8. Gross additional tax	30.06	12,862.39
9. Credit for gift tax	0.00	0.00
10. Net additional tax	30.06	12,862.39
11. Total net basic + add'l. tax	30.06	13,637.38
12. Defense tax	3.01	1,363.74
13. Total tax payable	33.07	15,001.12
Tax assessed on return	$33.07	
Deficiency assessed	1,476.67	
Total tax assessed		1,509.74
Deficiency		13,491.38

Upon receipt of a waiver, or upon the expiration of ninety days from the date of this letter, if a petition is not filed with The Tax Court of the United States, $12,809.39 of the deficiency will be assessed.

As the balance of the deficiency may be eliminated by credit for State estate inheritance, legacy or succession taxes, opportunity will be accorded for the submission of the evidence required by section 81.9 of Regulations 105. If after a reasonable time the evidence is not filed, the balance of the deficiency will be assessed.

Please advise when the credit evidence may be expected.

16 In the Tax Court of the United States

[Title omitted.]
[File endorsement omitted.]

Answer

Filed Oct. 13, 1943

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition filed in this proceeding admits and denies as follows:

I–II. Admits the allegations contained in paragraphs I and II of the petition.

III. Admits that the taxes in controversy are estate taxes on the one-half community interest of the Estate of Harry Holmes in the amount of $13,491.38, but denies the remaining allegations contained in paragraph III of the petition.

IV. (a) (b). Denies that the respondent erred in the manner alleged in subparagraphs (a) and (b) of paragraph IV of the petition.

V. Denies all material allegations contained in paragraph V of the petition.

17 Denies generally and specifically each and every allegation contained in the petition not hereinbefore expressly admitted, qualified or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

(Signed) J. W. Wenchel,
F. B. S.
J. P. Wenchel,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
James L. Backstrom,
Division Counsel,
Frank B. Schlosser,
Special Attorney,
Bureau of Internal Revenue.

FBS: mjh.

18 IN THE TAX COURT OF THE UNITED STATES

ESTATE OF HARRY HOLMES, DECEASED, LUCY B. HOLMES, INDEPENDENT EXECUTRIX, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 2943. Promulgated April 5, 1944

Decedent in 1935 executed a trust indenture by which he irrevocably conveyed to himself as trustee certain corporate stocks to be held in trust for his three sons. The period of the trust was to be 15 years and under certain conditions was to continue for a longer term. At the termination of the trust the trust estate then remaining in the hands of the trustee was to be distributed to the respective beneficiaries. The grantor retained for himself while acting as trustee the right to terminate either or all of said trusts and distribute the principal of the trusts to the persons entitled to receive the same under the terms thereof. The decedent retained no power to revest in himself or his estate the trust corpus or to change in any manner the portions of the trust estate which the beneficiaries were to receive. The decedent died in 1940 without having exercised his power to terminate the trusts. *Held*, that the value of the trust's corpus at decedent's death to the extent of the decedent's community property interest therein is not includable in his estate under the provisions of section 811 (d), Internal Revenue Code.

J. E. PRICE, ESQ., for the petitioner.

FRANK B. SCHLOSSER, ESQ., for the respondent.

19 *Opinion*

BLACK, Judge: The Commissioner has determined a deficiency in estate tax against the estate of Harry Holmes, deceased, of $13,491.38. The deficiency is due to six adjustments made by the Commissioner to the estate tax return filed for the estate by the executrix. Only one of these adjustments is contested. It is the one by which the Commissioner added to the value of the property reported by the executrix in the estate tax return an item of $91,593.17 designated as "transfers." This item is explained in the deficiency notice as follows:

"Pursuant to the provisions of Section 811 (d) of the Internal Revenue Code, it is held that the transfers made by the decedent to a trust executed under date of January 20, 1935, for the benefit of his three sons and certain other contingent beneficiaries, are properly includible in the gross estate of the decedent, that is to the extent of the decedent's community property interest therein. * * *"

Petitioner by appropriate assignment of error contests the correctness of the foregoing adjustment made by the Commission.

The facts have been stipulated and they are adopted as our findings of fact. The following summary of these facts will suffice for the purposes of this opinion:

Petitioner is the duly qualified and acting independent executrix of the estate of Harry Holmes, her husband. A timely estate tax return was filed with the Collector of Internal Revenue for the First District of Texas at Austin, Texas.

Harry Holmes of Houston, Texas, on January 20, 1935, executed an instrument which he signed "Harry Holmes, Grantor and Trustee" and which was duly acknowledged by him and recorded in the deed records of Harris County, Texas. In this instrument he created trusts in favor of his three sons, respectively, Harry Holmes, Jr., John B. Holmes, and Thomas J. Holmes, and
20 he conveyed to himself, Harry Holmes, trustee, and successor trustee provided for, for each of the sons, ten shares of stock in the Quintana Petroleum Company, a Texas corporation. This corporation was thereafter liquidated and the pro rata part of the corporation's assets conveyed to Harry Holmes, trustee, under and by virtue of the above-mentioned trusts instrument.

Harry Holmes died on October 5, 1940, five years and eight and one-half months after he had executed this instrument and without terminating the trusts.

The trust indenture contained, among others, the following provisions:

"FIRST

"That I, Harry Holmes, for and in consideration of One ($1.00) Dollar lawful money of the United States of America, and other good, valuable and sufficient consideration to me moving, receipt whereof is hereby acknowledged, do hereby irrevocably give, grant, convey, assign, transfer, set over and deliver said stock unto Harry Holmes, Trustee, during my lifetime—unless sooner terminated as hereinafter provided—and upon my death, unto my sons Harry Holmes, Jr., John B. Holmes, and Thomas J. Holmes, as Joint-Trustees, or such of them as shall have reached the age of twenty-one (21) years, or shall have had their disabilities of minority removed, or the survivor or survivors of them, or to such other Trustee as may be appointed, as hereinafter provided; * * * for the use and benefit of my sons, Harry Holmes, Jr., John B. Holmes, and Thomas J. Holmes, in equal shares, and such other beneficiaries and for such purposes as hereinafter provided, * * *

* * * * * *

"The term 'Trustee,' as herein used, shall be construed as
21 referring to myself while I act as Trustee hereunder, and thereafter to each and all of the Joint-Trustees named or provided for, as, if and when they act as such.

* * * * *

"THIRD

"The Trustee shall, upon the execution hereof, divide or allocate the Trust Estate into three equal shares or separate trusts, one share or trust for my son, Harry Holmes, Jr., his surviving issue, if any, and such other beneficiaries and for such other purposes as hereinafter provided; one share or trust for my son, John B. Holmes, his surviving issue, if any, and such other beneficiaries and for such other purposes as hereinafter provided; and one share or trust for my son, Thomas J. Holmes, his surviving issue, if any, and such other beneficiarie. and for such other purposes as hereinafter provided."

In the fourth, fifth, and sixth paragraphs of the trust indenture, each paragraph relating to a separate son, it was provided that during the lifetime of the named son and prior to the termination of the trust, the trustee should distribute the net income from the share or trust so allocated to the respective son in convenient installments, preferably monthly. It was also provided that the trustee might withhold distribution of any portion of said net income should he determine it for the best interest of his son; any portion of this net income so withheld was to be accumulated for the benefit of named son and added to his part of the trust corpus and turned over to him at the termination of the trust.

It was also provided in the fourth, fifth, and sixth paragraphs of the trust that should all of the settlor's sons die without leaving surviving issue prior to receipt and distribution of all of the residue of the trust estate, then such residue should be distributed to the settlor's wife, Lucy B. Holmes, if living, and if she
22 be not living, said residue should be distributed to the persons who would be her legal heirs under the laws of descent and distribution of the State of Texas.

The trust instrument further provided:

"SEVENTH

"The Trustee is hereby vested with full and complete legal and equitable title to all of the funds, property and estate embraced within the trusts hereof, both as to principal and income therefrom, subject only to the execution of the respective trusts herein created; and neither principal or the income of the Trust Estate

or of any trust herein created shall be liable for the debts of any beneficiary hereof, nor shall the same be subjected to seizure by any creditor of any beneficiary under any writ or proceeding at law, or in equity, and no beneficiary hereunder shall have any power to sell, assign, transfer, encumber or in any other manner anticipate or dispose of his or her interest in the Trust Estate, or the income produced thereby, prior to its actual receipt by such beneficiary.

* * * * *

"ELEVENTH

"Grantor, during his lifetime, and my son or sons herein named, while acting as Trustee hereunder, may, if deemed advisable by them as Trustee, distributed to either of Grantor's children, the whole or any part of the principal of their respective trusts, and their interests hereunder. And Grantor may, during his lifetime, if deemed advisable by him, and my son of sons herein named, while acting as Trustee hereunder, may, if deemed advisable by them as Trustee, terminate either or all of said trusts herein created for the respective benefit of my said sons, and dis-
23 tribute the principal of the trust to the persons entitled to receive the same under the terms hereof on the date of such termination."

* * * * *

"THIRTEENTH

"The several trusts herein created shall continue and exist and be administered by the Trustee as herein provided (unless distributed by Grantor prior to his death, or distributed by Harry Holmes, Jr., John B. Holmes, or Thomas J. Holmes, while they are acting as Trustee, as hereinbefore provided) for the period of fifteen (15) years from this date, provided that if, at the expiration of fifteen (15) years there are beneficiaries hereunder under the age of twenty-one (21) years, the trust shall be continued as to such beneficiaries' share or portion of such Trust Estate until such beneficiaries shall reach the age of twenty-one (21) years, or shall die, in either of which events the trust as to such portion shall terminate, and provided further, and it is hereby made an express condition of this trust that the same shall terminate twenty-one (21) years after the death of the last survivor of my said sons.

"Upon the termination of the trust herein created or of said respective trusts, as herein provided, the entire Trust Estate then remaining in the hands of the Trustee, whether principal or accumulated income, shall be immediately divided, distributed, and

paid over to the persons who are entitled to receive the same in the proportions and according to the provisions of this agreement."

The question which we have to determine in this proceeding is whether the value at date of death of decedent of certain property transferred by him under the terms of a trust indenture executed January 20, 1935, is includible in his gross estate under the provisions of section 811 (d) of the Internal Revenue Code printed in the margin.[1]

The applicable regulations are section 81.20, Treasury Regulations 105, printed in the margin.[2]

Paragraph (d) (1) of section 811, Internal Revenue Code, applies to "transfers after June 22, 1936." Paragraph (d) (2) of said section 811 applies to "transfers on or prior to June 22, 1936" and is the only part of section 811 (d) that applies to the

---

[1] SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) Decedent's Interest.—To the extent of the interest therein of the decedent at the time of his death;

* * * * * *

(d) Revocable Transfers.—

(1) Transfers After June 22, 1936.—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death;

(2) Transfers on or Prior to June 22, 1936.—To the extent of any interest therein of which the decedent has at any time made a transfer by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a transfer shall be included in the gross estate under paragraph (1) unless it is includible under this paragraph;

(3) Date of Existence of Power.—For the purposes of this subsection the power to alter, amend, or revoke shall be considered to exist on the date of the decedent's death * * *

[2] SEC. 81.20. Transfers with power to change the enjoyment.—(a) Transfers included.—Subsection (d) of section 811 embraces a transfer by trust or otherwise (if not amounting to a bona fide sale for an adequate and full consideration in money or money's worth) when at the time of decedent's death the enjoyment of the transferred property, or some part thereof or interest therein, was subject to any change through through a power exercisable either by the decedent alone, or by him in conjunction with some other person or persons, to alter, or amend, or revoke, or terminate. (See section 81.15)

The addition to subdivision (d) (1) of the Revenue Act of 1926, by section 805 of the Revenue Act of 1936, of the phrase to the effect that it is not material in what capacity the power was subject to exercise by the decedent or by the other person or persons in conjunction with the decedent (which phrase is also embodied in subsection (d) (1) of section 811 of the Internal Revenue Code), is considered merely declaratory of the meaning of the subdivision prior to the addition of the phrase.

* * * * * *

The third change made in the subdivision by the Revenue Act of 1936 (which is also embodied in subsection (d) (1) of section 811 of the Internal Revenue Code) consists of the addition of the words "or terminate" following the words "to alter, amend, revoke." Such addition is considered but declaratory of the meaning of the subdivision prior to the amendment. A power to terminate capable of being so exercised as to revest in the decedent the ownership of the transferred property or an interest therein, or as otherwise to inure to his benefit or the benefit of his estate, is, to that extent, the equivalent of a power to "revoke," and when otherwise so exercisable as to effect a change in the enjoyment, is the equivalent of a power to "alter."

instant case. If the value of the trust corpus here involved is not includable in decedent's estate under the last named provision, then it is not includable at all. We are cited to no other section of the statute under which it would be includable.

In support of his contention that the decedent, grantor of the trusts, retained such powers as to bring them within the provisions of section 811 (d) (2), printed in the margin, the Commissioner relies strongly on Mallon, et al. v. Driscoll, 117 Fed. (2d) 477, cert. denied, 313 U. S. 579, 26 AFTR 436. We do not think this case supports the Commissioner's determination but on the contrary is distinguishable on its facts. In that case in 1917 the settlor executed two deeds of trust for the benefit of his two minor children, a son Thomas and a daughter Lucille. Each of these instruments gave them the income from 150, $1,000 par value of bonds for life with power of appointment by will. After the death of decedent and the Commissioner had included the value of the trust corpus as a part of decedent's taxable estate, the taxpayer estate took the position that in the two trust indentures there involved the decedent had not reserved the power to alter, amend, or revoke the trust but that instead, although using
26 the word "revoke" he had really merely reserved the right to "terminate" the trust and not to "revoke" it and that the word "terminate" was not added to section 302, (d) until the Revenue Act of 1936 and therefore was not applicable to the trust indentures which the taxpayer had executed in 1917 in behalf of his two children, Thomas and Lucille Mellon, the decedent having died in 1934. The pivotal language of the trust indenture involved in Mellon v. Driscoll, supra, was as follows:

"The party of the first part hereby reserves the right after six months written notice of his intention so to do, served on the party of the second part, to revoke this trust, whereupon the principal of the trust fund shall be distributed to Thomas Mellon, S. Lucille Mellon Grange, and the trust shall end."

The Court overruled the contention of the taxpayer and held that the word "revoke" as contained in the statute prior to the 1936 amendment was broad enough to include the right to terminate the trust and that the addition of the word "terminate" to section 302 (d) (1) by the Revenue Act of 1936 did not change existing law but was merely declaratory of what was already the law. If the word "terminate" is understood to have the meaning that the Court gave it in Mellon v. Driscoll, then we agree that it is embraced by the word "revoke" as the statute existed prior to its amendment in the 1936 Act, passed June 22, 1936.

Webster's New International Dictionary, Second Edition, Unabridged, defines the word "revoke," as follows: "To recall, to

annul by recalling or taking back; to repeal, to take back, to reassume, to recover, to draw back, to restore to use or operation." It was evidently in this sense that the Court in Mellon v. Driscoll said that the word "terminate" was embraced within the meaning of the word "revoke." The Treasury in its own regulations recognizes that the word "terminate" in order to be embraced in the word "revoke" prior to the amendment of section 302 (d)
27 by the Revenue Act of 1936 must be interpreted to mean what the Court said it meant in Mellon v. Driscoll for in section 81.20, Regulations 105, printed in the margin, it is said: "* * * A power to terminate capable of being so exercised as to revest in the decedent the ownership of the transferred property or an interest therein, or as otherwise to inure to his benefit or the benefit of his estate, is, to that extent, the equivalent of a power to 'revoke,' and when otherwise so exercisable as to effect a change in the enjoyment, is the equivalent of a power to 'alter'."

The word "terminate" ordinarily does not have as broad and comprehensive a meaning as the word "revoke." The word "terminate" is defined in Webster's New International Dictionary, Second Edition, Unabridged, to mean "To put an end to, to make to cease; to end, to come to a limit in time; to end; close; to have its end; final part, or outcome." Only by giving the word "terminate" the meaning which it is said to have in the Treasury Regulations from which we have quoted above, do we think the Treasury would be justified in saying, as it does, that the word "terminate" was included in the word "revoke" prior to the amendment of June 22, 1936, and that the addition of such word by the amendment was only declaratory of what was already existing law. Therefore, in the light of the above discussion, we think Mellon v. Driscoll, supra, is distinguishable from the instant case because when the settlor, Mellon, created his trust he gave his son and daughter a life estate in the income only from certain property conveyed to the trustee. The two beneficiaries of the trust had no interest whatever in the remainder of the trust except to exercise the power of appointment by will and they could never get any interest therein, unless the grantor exercised the power to revoke or terminate the trust and then conveyed to them the title of the corpus of the trust which would revert to him by revocation or termination. Clearly it seems to us under these circumstances that would have been making another gift of property to
28 these two beneficiaries, the grantor's children. It would have been "a change in the amounts they are to take," because if the settlor did not exercise the power to terminate the trusts his two children would receive only the income of the trust for life but would never receive any of the corpus of the

trust, but would only have the power to appoint the trust estate by will.

Paul in his Federal Estate and Gift Taxation, Volume 1, section 7.09, dealing with "Trusts Subject to the Grantor's Power to Shift the Interests of the Beneficiaries" refers to the case of Mellon v. Driscoll, as follows: "And it has been held that a power to revoke which would change the beneficiaries' interests from life estates to absolute ownership make the grantor's estate taxable."

Thus in Mellon v. Driscoll the exercise of the power of revocation or termination meant a new conveyance of the corpus to the beneficiaries. In the instant case the remainder interest in the trust corpus as well as the right to receive the income during the term of the trust, subject to the right of the trustee to either distribute or accumulate the income for the named beneficiaries, were irrevocably vested in the three beneficiaries by the trust indenture itself and an exercise by the settlor of his power to terminate the trust meant only an acceleration of the time of enjoyment. The settlor reserved no power whatsoever to change the portions of the corpus which each beneficiary was to receive.

It is of course true, as respondent argues, that the mere fact that the settlor could not revest in himself or his estate any of the economic benefits of the property is of no importance. If under the power retained to terminate the trust he had also retained the power to alter or change the portions of the corpus which each beneficiary was to receive, then the value of the trust corpus over which he retained the power of change and alteration would have been includable as a part of his estate. Porter v. Commissioner, 288 U. S. 436, and many other cases which can be cited on that point. And it would have been unimportant whether this power had been retained by Holmes as settlor or only exercisable
29 by him as trustee. Welch v. Terhune, 126 Fed. (2d) 695, cert. denied, 317 U. S. 644.

But in transfers made on or prior to June 22, 1936, where the settlor has retained only a power to terminate the trust and has retained no power to revest in himself or in his estate any part of the trust corpus or to change or alter the disposition of the trust corpus already given to the beneficiaries under the terms of the trust indenture but only to accelerate the time of its enjoyment, we do not think the value of the trust corpus is includable under section 811 (d) (2), Internal Revenue Code, or any other provision of the Internal Revenue Code. As to whether such transfers with such a power to "terminate" as we have here made after June 22, 1936, will be includable in a decedent's estate under section 811 (d) (1), Internal Revenue Code, we express no opinion. We do not have that state of facts before us.

In consideration of the question we have here to decide it is appropriate that we consider that the gift tax and the estate tax are closely related. See Sanford's Estate v. Commissioner, 308 U. S. 39; Higgins v. Commissioner, 129 Fed. (2d) 237, cert. denied, 63 S. Ct. 57.

It seems clear that under Treasury Regulations 108 relating to the gift tax that when decedent executed the trust indenture January 20, 1935, by which he conveyed the shares of stock in trust for the benefit of his three sons, he made a completed gift to each son and that such gifts were taxable in that year to the donor to the extent of their full value. It also seems clear that his reservation of the power to terminate the trusts under paragraph eleven thereof but not to change the beneficiaries or to change the respective interests which they were to receive, did not render the gifts incomplete. The Treasury Regulations so provide. A part of sec. 86.3, Regulations 108 relating to "Cessation of Donor's Dominion and Control" reads:

"A gift shall not be considered incomplete, however, merely because the donor reserves the power to change the manner or time of enjoyment thereof. Thus, the creation of a trust the income of which is to be paid annually to the donee for a period of years, the corpus being distributable to him at the end of the period, and the power reserved by the donor being limited to a right to require that, instead of the income being so payable, it should be accumulated and distributed with the corpus to such donee at the termination of the period, constitutes a completed gift."

Suppose that decedent in the year of his death and prior thereto had by a formal instrument in writing relinquished his right to terminate the trusts which had been reserved in paragraph eleven thereof, would such a relinquishment have been the occasion for the imposition of a gift tax? We think not. There would have been by such act no new gift or the completion of a tentative gift already made to justify the imposition of a gift tax on such a relinquishment. If there would have been no imposition of the gift tax on his voluntary surrender of the right to terminate because there would have been no sufficient transfer of property to justify the tax, it is difficult to see how an estate tax would be imposed upon his involuntary cessation of such right by death. For reasons we have already stated we think there was none.

Another case upon which the Commissioner relies is Welch v. Terhune, supra. We think that case is also distinguishable on its facts. The pivotal clause of the trust indenture involved in Welch v. Terhune was as follows:

"This Trust may be terminated or amended at any time, but only with the written consent of the three Trustees herein named,

and of any Trustee appointed by William L. Terhune under clause 14 hereof, or the survivors or survivor of them, and of the then surviving children of the said William L. Terhune."

The decision in the Terhune case turned on the fact that Terhune reserved the right to amend the trust in conjunction
31 with the power to terminate it. This fact, we think, is shown from the following quotation from the court's opinion in the Terhune case:

"In the trust instrument there was also given the power to "amend." The plaintiffs contend that this power must be strictly construed so as to refer only to the minor changes in the mechanics of the operation or management of the trust and not to permit any amendment which would materially vary the respective property interests of the beneficiaries. * * *

"We are sure that these powers to terminate or amend, taken in conjunction, would authorize changes to be made in the enjoyment of the property interests at least as broad as those we held sufficient in Chickering v. Commissioner, 118 F. 2d 254, * * *. And see Commissioner v. Chase National Bank, 82 F. 2d 157, * * *. How much further these granted powers might extend we need not now inquire."

As we have already pointed out, the trust indenture here involved reserves the right to the grantor neither as an individual nor as a trustee to alter or amend the trust. He only had the right to terminate it and thereby accelerate the time that the beneficiaries might enjoy the corpus of the trust which had already been irrevocably given to them in the trust indenture.

For reasons which we have stated above, we hold that the Commissioner erred in adding to the value of decedent's estate the item of $91,593.17 which he designated in his deficiency notice as "transfers."

Reviewed by the Court.

Decision will be entered under Rule 50.

[SEAL]

32 In The Tax Court of the United States, Washington
Docket No. 2943

ESTATE OF HARRY HOLMES, DECEASED, LUCY B. HOLMES, INDEPENDENT EXECUTRIX, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Decision

Pursuant to the Court's Opinion, promulgated April 5, 1944, the respondent having filed a recomputation of tax on May 1, 1944, and

the petitioner having filed an acquiescence in said recomputation on May 11, 1944, it is

Ordered and decided: That there is no deficiency in estate tax.

Enter:

(Signed) EUGENE BLACK, *Judge.*

Entered May 13, 1944.

33 [File endorsement omitted.]

In the United States Circuit Court of Appeals for the Fifth Circuit

Docket No. 2943

JOSEPH D. NUNAN, JR., COMMISSIONER OF INTERNAL REVENUE, PETITIONER ON REVIEW

v.

ESTATE OF HARRY HOLMES, DECEASED, LUCY B. HOLMES, INDEPENDENT EXECUTRIX, RESPONDENT ON REVIEW

Petition for review and assignments of error

Filed Aug. 3, 1944

To the Honorable Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Now comes Joseph D. Nunan, Jr., Commissioner of Internal Revenue, by his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and Ralph F. Staubly, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I

That he is the duly appointed, qualified and acting Commissioner of Internal Revenue, appointed and holding office by virtue of the laws of the United States; that Lucy B. Holmes, residing at 2315 Dryden Road, Houston, Texas, is the independent executrix of the Estate of Harry Holmes, deceased; that said Harry Holmes died a resident of Houston, Texas, on October 5, 1940;

34 that the estate tax return, Form 706, made for the estate of the decedent, was filed with the Collector of Internal Revenue for the First District of Texas, whose office is located at Austin, Texas, which is within the jurisdiction of the United States Circuit Court of Appeals for the Fifth Circuit.

That the Court in which the review in this proceeding is sought is the United States Circuit Court of Appeals for the Fifth Circuit.

II

The nature of the controversy is as follows, to wit:

The estate tax return filed on behalf of the decedent's estate disclosed a tax liability of $33.07. The decedent during his lifetime, on January 20, 1935, made a transfer by trust of certain community property for the benefit of his three sons, under the provisions of which trust the decedent reserved the right to terminate the same within the purview of section 811 (d) of the Internal Revenue Code.

No part of the corpus of the above referred to trust was included in the decedent's gross estate in the estate tax return filed on behalf of his estate. Under date of July 3, 1943, the Commissioner of Internal Revenue mailed a notice to the executrix aforesaid, asserting a deficiency in estate tax in the amount of $13,491.38. In determining the deficiency aforesaid the Commissioner included in the decedent's gross estate the corpus of the aforesaid trust to the extent of the decedent's community interest therein as a transfer intended to take effect at or after the decedent's death, within the purview of section 811 (d) of the Internal Revenue Code.

Under date of September 17, 1943, the executrix aforesaid filed a petition with the Tax Court of the United States for redetermination of the deficiency in the estate tax as determined by the Commissioner. After the answer of the Commissioner was duly filed, the case was submitted to the Tax Court for decision upon the pleadings and a stipulation of facts. The opinion of the Tax Court was promulgated April 5, 1944, and the decision of
35 Tax Court redetermining the deficiency, was entered May 13, 1944, wherein it was ordered and decided that there is no deficiency in estate tax.

In redetermining the deficiency, the Tax Court held that no part of the corpus of the aforesaid trust was subject to be included in the decedent's gross estate for the purpose of the tax.

III

The Commissioner of Internal Revenue, being aggrieved by the conclusions of law contained in the opinion of the Tax Court and by its decision, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Fifth Circuit.

The Commissioner's assignments of error are as follows:

1. The Tax Court erred in holding and deciding that the transfer made by the decedent by the trust deed of January 20, 1935, is not subject to be included in the decedent's gross estate for the purpose of the tax.

2. The Tax Court erred in refusing to hold and decide that the transfer made by the decedent by trust deed of January 20, 1935, was subject to be included in the decedent's gross estate under the provisions of section 811 (d) of the Internal Revenue Code.

3. The Tax Court erred in that its opinion and decision are not supported by the evidence, and are contrary to law and regulations.

4. The Tax Court erred in entering its decision that there is no deficiency in estate tax.

Wherefore, the Commissioner petitions that the decision of the Tax Court of the United States be reviewed by the United States Circuit Court of Appeals for the Fifth Circuit, that a transcript of record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court
36 for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Signed) Samuel O. Clark, Jr.,
S. L. Y.
SAMUEL O. CLARK,
Assistant Attorney General,

(Signed) J. P. Wenchel,
S. L. Y.
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:
RALPH F. STAUBLY,
Special Attorney,
Bureau of Internal Revenue.

[*Duly sworn to by Ralph F. Staubly; jurat omitted in printing.*]

37 In the United States Circuit Court of Appeals for the Fifth Circuit

[Title omitted.]
[File endorsement omitted.]

Notice of filing petition for review.

Filed Aug. 14, 1944

To Mrs. LUCY B. HOLMES,
Independent Executrix, Estate of Harry Holmes, Deceased,
2315 Dryden Road, Houston, Texas.

You are hereby notified that the Commissioner of Internal Revenue did, on the 2nd day of August 1944, file with the Clerk of the

Tax Court of the United States, at Washington, D. C., a petition for a review by the United States Circuit Court of Appeals for the Fifth Circuit, of the decision of the Tax Court heretofore rendered in the above-entitled case. A copy of the petition for
38 review and assignments of error as filed is hereto attached and served upon you.

Dated this 2nd day of August 1944.

(Signed) J. P. Wenchel,
S. L. Y.
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 8th day of August 1944.

(Sgd.) ESTATE OF HARRY HOLMES,
DECEASED,
LUCY B. HOLMES,
Independent Executrix,
Respondent on Review.

39 In the United States Circuit Court of Appeals for the Fifth Circuit.

[Title omitted.]
[File endorsement omitted.]

Notice of filing petition for review

Filed Aug. 14, 1944

To J. E. PRICE, Esq.,
13th Floor, Sterling Building, Houston, Texas.

You are hereby notified that the Commissioner of Internal Revenue did, on the 2nd day of August 1944, file with the Clerk of the Tax Court of the United States, at Washington, D. C., a petition for a review by the United States Circuit Court of Appeals for the Fifth Circuit, of the decision of the Tax Court heretofore rendered in the above-entitled case. A copy of the petition for
40 review and assignments of error as filed is hereto attached and served upon you.

Dated this 2nd day of August 1944.

(Signed) J. P. Wenchel,
S. L. Y.
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 5th day of August 1944.

(Sgd.) J. E. PRICE,
Attorney for Respondent on Review.

41 In the Tax Court of the United States

[Title omitted.]

Stipulation of facts

Filed at Hearing Oct. 25, 1943

It is hereby stipulated and agreed that the Court may find the following facts to be true in its determination of the issue involved in this proceeding, subject to the right of either party to offer other evidence not inconsistent with the facts so stipulated.

1. Petitioner is the duly qualified and acting independent executrix of the Estate of Harry Holmes, her husband, who died on October 5, 1940, while a resident of Houston, Texas. A timely estate tax return was filed with the Collector of Internal Revenue for the First District of Texas, at Austin, Texas.

2. By a trust indenture executed under date of January 20, 1935, decedent transferred to himself, as trustee, thirty shares of the capital stock of the Quintana Petroleum Company, to be
42 held in trust for the benefit of his three sons, and certain other contingent beneficiaries, under the terms and conditions set forth in the trust instrument, a true copy of which is attached hereto, marked "Exhibit A," and made a part hereof. Said instrument was filed for registration in the office of the Clerk of the County Court of Harris County, Texas, on November 14, 1938, and duly recorded on November 22, 1938.

3. The said thirty shares of the capital stock of the Quintana Petroleum Company consitituted a part of the community estate of the decedent and his wife, Lucy B. Holmes, the petitioner herein. Quintana Petroleum Company was liquidated on December 31, 1938, and, as the result thereof, a prorata part of the assets of the company were conveyed to decedent as trustee under and by virtue of the trust instrument of January 20, 1935.

4. Decedent did not relinquish his duties as trustee, but continuously acted as such up until the date of his death. It is agreed that the fair market value of a one-half interest in the assets of the trust in the hands of decedent on October 5, 1940, the date of his death, was $91,593.17.

5. In the estate tax return filed by petitioner, the properties in the hands of decedent as trustee under the aforesaid trust indenture of January 20, 1935, were not returned as a part of gross estate. The respondent, in his notice of deficiency, has in-
43 cluded in gross estate decedent's community one-half interest in the said assets at a value of $91,593.17. The correctness of this adjustment is the sole issue for decision by the Court.

J. E. PRICE.
Counsel for Petitioner.
(Sgd.) J. P. Wenchel,
J. L. B.
J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Exhibit A to stipulation of facts

THE STATE OF TEXAS,
County of Harris.

Whereas, the undersigned, Harry Holmes, desiring to create an irrevocable living trust for my sons, Harry Holmes, Jr., John B. Holmes and Thomas J. Holmes, and for such other beneficiaries and for such other purposes as may be hereinafter designated, have, on this the 20th day of January A. D. 1935, transferred and caused to be issued to me as Trustee, thirty (30) shares of the capital stock of the Quintana Petroleum Company, evidenced by:

Certificate No.	Dated	Shares
19	January 20, 1935	10
20	January 20, 1935	10
21	January 20, 1935	10

Now, therefore, in consideration of the premises, I, Harry Holmes, of the County of Harris and State of Texas, here-
44 inafter called Grantor, do hereby and by these presents, convey, contract, agree, declare, provide, and stipulate as follows, to wit:

FIRST

That I, Harry Holmes, for and in consideration of One ($1.00) Dollar lawful money of the United States of America, and other good, valuable, and sufficient consideration to me moving, receipt whereof is hereby acknowledged, do hereby irrevocably give, grant, convey, assign, transfer, set over, and deliver said stock unto Harry Holmes Trustee, during my lifetime—unless sooner

terminated as hereinafter provided—and upon my death, unto my sons, Harry Holmes, Jr., John B. Holmes, and Thomas J. Holmes, as Joint-Trustees, or such of them as shall have reached the age of twenty-one (21) years, or shall have had their disabilities of minority removed, or the survivor or survivors of them, or to such other Trustee as may be appointed as hereinafter provided; and I do hereby bind myself and my successor Trustee or Trustees, as hereinafter provided, to hold said stock, together with all and singular all sums of money and other property and effects of every kind and character which may hereafter come into my hands as Trustee, or into the hands of my successor Trustee or Trustees, together with all income, rents, revenues, and profits therefrom, and the increases thereof, and all changes and mutations thereof, in trust, nevertheless, for the use and benefit of ~~my~~ sons, Harry Holmes, Jr., John B. Holmes, and Thomas J. Holmes, in equal shares; and such other beneficiaries and for such other purposes as hereinafter provided, and I do hereby agree to make and execute whatever assignments, transfers, and conveyances that may be necessary from time to time to carry out the purposes of this trust; provided, however, that I may, during my lifetime, resign or retire as Trustee hereunder, in which event, as to any or either of said trusts that may not have been terminated, my successor Trustee or Trustees, as above named, shall become the active Trustees hereunder and become vested with all the rights herein conferred upon the Trustee named.

Should my sons, Harry Holmes, Jr., John B. Holmes and Thomas J. Holmes, or either of them, fail or refuse or be unable to accept the office of Trustee hereunder, or should either of them die or resign after acceptance, then such of them as do accept the trust, or the survivors or survivor, or remaining Trustees or Trustee, shall become vested with all the rights herein conferred upon the Joint-Trustees. My successor Trustees shall indicate their acceptance of the trust by instrument of writing recorded in the office of the County Clerk of Harris County, Texas, and upon the death or resignation of any Trustee, the remaining or succeeding Trustees or Trustee shall, by instrument in writing, filed in the office of the County Clerk of Harris County, Texas, record such fact, to the end that the proper records may at all times reflect who are the active Trustees hereunder.

If I should die or resign as Trustee hereunder before the termination of this trust, or of either of the trusts herein created, and my sons, John B. Holmes and Thomas J. Holmes, or either of them, not be twenty-one (21) years of age, or shall not have had their disabilities of minority removed, then upon their, or either of them, reaching the age of twenty-one (21) years, or having their

disabilities of minority removed, and the filing and recording in the office of the County Clerk of Harris County, Texas, of an instrument of acceptance, shall become Trustees, or Trustee, hereunder.

Should all of my successor Trustees herein named die or
46 refuse to act as Trustee, then, in that event, the District Court of Harris County, Texas, shall, upon application of any person interested in the trust, name, constitute and appoint a Trustee to carry out the trust.

Should all the Trustees herein named who are twenty-one (21) years of age or who have had their disabilities of minority removed, die or refuse to act as Trustee hereunder, and there should be one or more of such named Trustees who has not had his disabilities of minority removed, then, in such event, the District Court of Harris County, Texas, shall, upon application of any person interested in said trust, name, constitute, and appoint a trustee ad interim to carry out the trust during the minority of such named Trustee or until he shall have his disabilities of minority removed, at which time, or at any time thereafter, upon filing and recording in the office of the County Clerk of Harris County, Texas, of an instrument of acceptance, he shall succeed the person so appointed by the court, and such court appointee shall surrender to such named Trustee possession, control and management of said Trust Estate, and such court appointee's Trusteeship shall be terminated.

In case the court should appoint any Trustee hereunder, such order of appointment shall require such Trustee, within twenty (20) days thereafter, to file a complete inventory of said Trust Estate to be approved by the court, together with bond payable to the beneficiaries of such respective trusts in double the value of such Trust Estates, conditioned for the faithful performance of said trust and the payment to said beneficiaries, in accordance with the terms hereof, said bond to be approved by the court making such appointment (the premium paid for said bond to be deemed and considered a legitimate expense of the Trust), which
order of appointment, inventory and bond and order of
47 approval shall be duly filed and recorded in the office of the County Clerk of Harris County, Texas, and such Trustee shall also be required to file with the Clerk of said court annually, during the month of January, of each year, a complete statement showing all transactions of said trust during the previous calendar year, and all income, expense, and disbursements thereof, and the financial condition thereof, a copy of which statement shall be furnished to each beneficiary thereof, and the failure of such appointed Trustee to prepare and file such statement and furnish copy thereof to each beneficiary, as herein provided, shall be just

cause for removal by the court, upon application of any beneficiary. This shall not be construed as a limitation upon the power of said court to remove said appointed Trustee for any other cause by the court deemed expedient.

The term "Trustee," as herein used, shall be construed as referring to myself while I act as Trustee hereunder, and thereafter to each and all of the Joint-Trustees named or provided for, as, if and when they act as such.

It is expressly provided that any Joint-Trustee herein named may delegate to any Joint-Trustee hereunder any and all powers, discretionary, or otherwise, which are herein delegated to him as such Trustee, and may execute and deliver to either of the other Trustees, a revocable power of attorney, delegating any or all of such powers, but such power of attorney, if executed, shall be filed and recorded in the office of the County Clerk of Harris County, Texas, and shall be revocable at the will of the party making the same, by filing an instrument of revocation in the office of the County Clerk of Harris County, Texas; but such revocation shall not affect or impair the validity or effect of any act performed thereunder prior to the filing of such revocation.

48 SECOND

The Trustee is hereby authorized and empowered to manage and control said trust property, with full power and authority, in the discretion of the Trustee, and in the same manner and to the same extent as the Grantor herein could or would do in the absence of this trust agreement; the Trustee is expressly authorized to invest and re-invest said trust funds, to sue for, collect and receive, all money, property and/or effects due, owing or belonging to said trust, and to issue receipts and acquittances therefor; to contract for the sale of, and or sell at public or private sale, all property, whether real, personal or mixed, of whatsoever kind and wheresoever situated, belonging to said Trust Estate, for such price and upon such terms as to the Trustee may seem most advantageous, to convey with or without covenants of warranty, to execute, acknowledge and deliver to any purchasers thereof, good and sufficient deeds or other instruments of transfer; to lease for any term, even though the term of such lease may extend beyond the term of this trust; to negotiate, execute and deliver oil and mineral leases covering the lands of the Trust Estate upon any terms and conditions the Trustee may deem advisable; exchange all or any of said property, mortgage, pledge, hypothecate or otherwise deal with any property or assets that may from time to time comprise this Trust Estate; to renew, extend, and/or rearrange any or all indebtedness, and/or liens owing by, or existing against, the Trust Estate; to compromise, settle, abandon, and/or relinquish

any or all claims due or owing to the Trust Estate, or in which it may be interested, to operate any business or interest in business comprised in this Trust Estate, or in which it is in any manner interested, or which might in the discretion of the Trustee be advantageously operated in connection with this Trust Estate;

49 to invest and reinvest the property and funds of this Trust Estate in such securities or other property, real, or personal, as in the discretion of the Trustee may be deemed most advisable for the benefit of the trust herein created; to incur and pay out of said trust funds such expenses or other charges as the Trustee may deem necessary or advisable for the benefit of the Trust Estate, and the right and power to apportion as between income and capital, any expenditure, which, in his opinion, should be so apportioned, notwithstanding any legal rule to the contrary, and the Trustee, in his discretion, may retain investments in the form received, and shall not be limited in his powers to make investments to the class of securities regarded as legal investments for trust funds. The Trustee herein named or provided for is expressly authorized and empowered to employ for a limited or unlimited time, a manager or one or more managers for any or all of the property comprising this Trust Estate, and the Trustee is authorized to delegate to such manager or managers such power and authority as may be deemed advisable and which are herein vested in the Trustee.

The Trustee hereof is also expressly authorized to purchase from the executor or administrator of Grantor's estate any property, real or personal, contained in said estate, and is also expressly authorized to make loans to such executor or administrator of Grantor's Estate, either secured or unsecured, and at such rate of interest as the Trustee shall deem advisable, provided, however, the Trustee hereof shall not be responsible for any loss resulting to this Trust Estate by reason of retaining as a part of this Trust Estate any property purchased from Grantor's general estate.

The above enumeration of powers of the Trustee herein

50 shall never be construed as a limitation upon the right and power of the Trustee to do any and all things whatsoever by the Trustee deemed necessary or requisite in the administration of this Trust Estate.

THIRD

The Trustee shall, upon the execution hereof, divide or allocate the Trust Estate into three equal shares or separate trusts, one share or trust for my son, Harry Holmes, Jr., his surviving issue, if any, and such other beneficiaries and for such other purposes, as hereinafter provided; one share or trust for my son, John B. Holmes, his surviving issue, if any, and such other beneficiaries

and for such other purposes, as hereinafter provided; and one share or trust for my son, Thomas J. Holmes, his surviving issue, if any, and such other beneficiaries and for such other purposes as hereinafter provided.

FOURTH

During the lifetime of my son, Harry Holmes, Jr., and prior to the termination of the trust herein created for his benefit, the Trustee shall distribute the net income from the share or trust so allocated to my son, Harry Holmes, Jr., to him in convenient installments, preferably monthly; provided the Trustee may withhold distribution of any portion of said net income, should he determine it for the best interest of my said son, any portion of said net income so withheld to be accumulated for his benefit; provided, should my said son, Harry Holmes, Jr., die during the continuance of said trust and leave issue surviving, then, his share or trust shall be held for the benefit of his surviving issue, share and share alike. If such issue be over twenty-one (21) years of age, his or her share or portion of said trust shall be distributed and delivered to such beneficiary, and the trust, as it relates to such
51 portion, shall thereupon be terminated. If any such issue shall be under the age of twenty-one (21) years, the Trustee shall use such portion of the net income on such beneficiary's share, or trust, as in the discretion of the Trustee may be deemed necessary or advisable to provide for such beneficiary's care, support, maintenance, and education, until such beneficiary arrives at the age of twenty-one (21) years, any unused portion of said net income to accumulate for the benefit of such beneficiary. When such beneficiary arrives at the age of twenty-one (21) years, he or she shall receive the entire portion of the Trust Estate from which he or shee shall have theretofore received the income.

If my son, Harry Holmes, Jr., shall die during the continuance of the trust so allocated to him, without leaving surviving issue, or if he shall leave such issue, but such issue shall die before reaching the age of twenty-one (21) years, then, in either of such events, the share or trust that would have gone to my said son, Harry Holmes, Jr., or his said issue, shall enure pro rata to my sons, John B. Holmes and Thomas J. Holmes, if living, and if not living, to their issue, such issue to take per stirpes. If either of my sons John B. Holmes or Thomas J. Holmes, should then be dead without issue, the whole of such share or trust shall enure to the survivor, or to the issue of the other, to be administered and distributed in the same manner as hereinafter provided for the administration and distribution of the trust in this instrument created for the benefit of such surviving son, or his issue.

Should all of my said sons die without leaving surviving issue prior to receipt and distribution of all of the residue of this Trust Estate, then and thereupon, said residue shall be distributed to Grantor's wife, Lucy B. Holmes, if living, and if she is not
52 then living, said residue shall be distributed to the persons who would be her legal heirs under the laws of descent and distribution of the State of Texas.

If, at any time during the continuance of this trust, it should be, in the opinion of the Trustee, necessary or advisable to use some portion of the principal herein set aside and allocated to my son, Harry Holmes, Jr., or his issue, as herein provided, for the maintenance, welfare, comfort or happiness of my said son, or his issue, or any beneficiary thereof, or for the education of any of such beneficiaries, the Trustee is hereby authorized and empowered to use so much of the principal as in the opinion of the Trustee is deemed necessary or advisable to meet such conditions; any principal so used to be charged to the beneficiary for whose benefit such use of principal is made when distribution is made hereunder. Grantor hereby suggests that the Trustee be liberal in construing for the benefit of Grantor's said son or his surviving issue, any condition or circumstance that may require the use or distribution or said principal to provide for the maintenance, welfare, comfort or happiness of Grantor's said son or his surviving issue.

FIFTH

During the lifetime of my son, John B. Holmes, and prior to the termination of the trust herein created for his benefit the Trustee shall distribute the net income from the share or trust so allocated to my son, John B. Holmes, to him in convenient installments, preferably monthly; provided the Trustee may withhold distribution of any portion of said net income, should he determine it for the best interest of my said son, any portion of said net income witheld to be accumulated for his benefit; provided, should my said son, John B. Holmes, die during
53 the continuance of said trust and leave issue surviving, then, his share or trust shall be held for the benefit of his surviving issue, share and share alike. If such issue be over twenty-one (21) years of age, his or her share or portion of said trust shall be distributed and delivered to such beneficiary, and the trust, as it relates to such portion, shall thereupon be terminated. If any such issue shall be under the age of twenty-one (21) years, the Trustee shall use such portion of the net income on such beneficiary's share, or trust, as in the discretion of the Trustee may be deemed necessary or advisable to provide for such beneficiary's care, support, maintenance and education, until such

beneficiary arrives at twenty-one (21) years, any unusued portion or said net income to accumulate for the benefit of such beneficiary. When such beneficiary arrives at the age of twenty-one (21) years, he or she shall receive the entire portion of the Trust Estate from which he or she shall have theretofore received the income.

If my son, John B. Holmes, shall die during the continuance of the trust so allocated to him, without leaving surviving issue, or if he shall leave such issue, but such issue shall die before reaching the age of twenty-one (21) years, then, in either of such events, the share or trust that would have gone to my said son, John B. Holmes, or his said issue, shall enure pro-rata to my sons, Harry Holmes, Jr., and Thomas J. Holmes, if living, and if not living, to their issue, such issue to take per stirpes. If either of my sons, Harry Holmes, Jr., or Thomas J. Holmes, should then be dead without issue, the whole of such share or trust shall enure to the survivor or to the issue of the other, to be administered and distributed in the same manner as in this instrument provided for the administration and distribution of the trust in this instrument created for the benefit of such surviving son, or his issue.

54 Should all of my said sons die without leaving surviving issue prior to receipt and distribution of all of the residue of this Trust Estate, then and thereupon, said residue shall be distributed to Grantor's wife, Lucy B. Holmes, if living, and if she is not then living, said residue shall be distributed to the persons who would be her legal heirs under the laws of descent and distribution of the State of Texas.

If, at any time during the continuance of this trust, it should be, in the opinion of the Trustee, necessary or advisable to use some portion of the principal herein set aside and allocated to my son, John B. Holmes, or his issue, as herein provided, for the maintenance, welfare, comfort or happiness of my said son, or his issue, or any beneficiary thereof, or for the education of any of such beneficiaries, the Trustee is hereby authorized and empowered to use so much of the principal as in the opinion of the Trustee is deemed necessary or advisable to meet such conditions; any principal so used to be charged to the beneficiary for whose benefit such use of principal is made when distribution is made hereunder. Grantor hereby suggests that the Trustee be liberal in construing for the benefit of Grantor's said son or his surviving issue, any condition or circumstance that may require the use or distribution of said principal to provide for the maintenance, welfare, comfort or happiness of Grantor's said son or his surviving issue.

SIXTH

During the lifetime of my son, Thomas J. Holmes, and prior to the termination of the trust herein created for his benefit, the

Trustee shall distribute the net income from the share or trust so allocated to my son, Thomas J. Holmes, to him in convenient installments, preferably monthly, provided the Trustee may
55 withhold distribution of any portion of said income, should he determine it for the best interest of my said son, any portion of said net income so withheld to be accumulated for his benefit; provided, should my said son, Thomas J. Holmes, die during the continuance of said trust and leave issue surviving, then, his share or trust shall be held for the benefit of his surviving issue, share and share alike. If such issue be over twenty-one (21) years of age, his or her share or portion of said trust shall be distributed and delivered to such beneficiary, and the trust, as it relates to such portion, shall thereupon be terminated. If any such issue shall be under the age of twenty-one (21) years, the Trustee shall use such portion of the net income on such beneficiary's share, or trust, as in the discretion of the Trustee may be deemed necessary or advisable to provide for such beneficiary's care, support, maintenance and education, until such beneficiary arrives at the age of twenty-one (21) years, any unused portion of said net income to accumulate for the benefit of such beneficiary. When such beneficiary arrives at the age of twenty-one (21) years, he or she shall receive the entire portion of the Trust Estate from which he or she shall have theretofore received the income.

If my son, Thomas J. Holmes, shall die during the continuance of the trust so allocated to him, without leaving surviving issue, or if he shall leave such issue, but such issue shall die before reaching the age of twenty-one (21) years, then, in either of such events, the share or trust that would have gone to my said son, Thomas J. Holmes, or his said issue, shall enure pro rata to my sons, Harry Holmes, Jr., and John B. Holmes, if living, and if not living, to their issue, such issue to take per stirpes. If either of my sons, Harry Holmes, Jr., or John B. Holmes, should
56 then be dead without issue, the whole of such share or trust shall enure to the survivor or to the issue of the other, to be administered and distributed in the same manner as in this instrument provided for the administration and distribution of the trust in this instrument created for the benefit of such surviving son, or his issue.

Should all of my said sons die without leaving surviving issue prior to receipt and distribution of all of the residue of this Trust Estate, then and thereupon, said residue shall be distributed to Grantor's wife, Lucy B. Holmes, if living, and if she is not then living, said residue shall be distributed to the persons who would be her legal heirs under the laws of descent and distribution of the State of Texas.

If, at any time during the continuance of this trust it should be, in the opinion of the Trustee, necessary or advisable to use some portion of the principal herein set aside and allocated to my son, Thomas J. Holmes, or his issue, as herein provided, for the maintenance, welfare, comfort or happiness of my said son, or his issue, or any beneficiary thereof, or for the education of any of such beneficiaries, the Trustee is hereby authorized and empowered to use so much of the principal as in the opinion of the Trustee is deemed necessary or advisable to meet such conditions; any principal so used to be charged to the beneficiary for whose benefit such use of principal is made when distribution is made hereunder Grantor hereby suggests that the Trustee be liberal in construing for the benefit of Grantor's said son or his surviving issue, any condition or circumstance that may require the use or distribution of said principal to provide for the maintenance, welfare, comfort or happiness of Grantor's said son or his surviving issue.

57 SEVENTH

The Trustee is hereby vested with full and complete legal and equitable title to all of the funds, property and estate embraced within the trusts hereof, both as to principal and income therefrom, subject only to the execution of the respective trusts herein created; and neither principal or the income of the Trust Estate or of any trust herein created shall be liable for the debts of any beneficiary hereof, nor shall the same be subject to seizure by any creditor of any beneficiary under any writ or proceeding at law, or in equity, and no beneficiary hereunder shall have any power to sell, assign, transfer, encumber or in any other manner anticipate or dispose of his or her interest in the Trust Estate, or the income produced thereby, prior to its actual receipt by such beneficiary.

EIGHTH

In any case in which the Trustee is required, pursuant to the provisions of this trust agreement, to allocate or divide the property into separate trusts, or to divide the principal of either or any trust so allocated, and distribute the same, said Trustee is authorized and empowered to make such allocation, division or distribution in kind, or partly in kind and partly in money, as in the discretion of the Trustee may be deemed advisable, and for the purpose of such allottments, division or distribution, the judgement of the Trustee concerning the propriety thereof, and the relative value thereof, for the purpose of allocation or for division and distribution, shall be binding and conclusive on all parties interested therein.

NINTH

58 The Trustee shall keep books of account showing all transactions relating to the Trust Funds held by the Trustee under this trust agreement, and shall also, in each year, furnish to each adult beneficiary interested in the trust or trusts, a statement showing how such trust funds are invested and all transactions relating thereto, subsequent to the last preceding annual account.

TENTH

The Trustee shall never be liable to any beneficiary hereunder for any error of judgment or for any loss arising out of any act or omission in the execution of this trust, except for fraud, misapplication or wilfull neglect.

No person dealing with the Trustee hereof shall ever be required to look to the application of any of the trust funds by such Trustee.

The Trustee shall have, and is hereby given, the express right to apportion any and all stock dividends or benefits from the sale of securities or other property, or any part thereof, either to income or as additions to principal.

ELEVENTH

Grantor, during his lifetime, and my son or sons herein named, while acting as Trustee hereunder, may, if deemed advisable by them as Trustee, distribute to either of Grantor's children, the whole or any part of the principal of their respective trusts, and their interests thereunder. And Grantor may, during his lifetime, if deemed advisable by him, and my son or sons herein named, while acting as Trustee hereunder, may, if deemed advisable by them as Trustee, terminate either or all of said trusts herein created for the respective benefit of my said sons, and distribute the principal of the trust to the persons entitled to receive the same under the terms hereof on the date of such termination.

59 TWELFTH

Neither Grantor or either of the Trustees herein named shall receive any compensation for their services as such Trustee. Any Trustee appointed by the court shall receive for his services, or for the joint services, if more than one be so appointed, an annual fee of not to exceed three percent (3%) of the net income of the trust for which he acts.

THIRTEENTH

The several trusts herein created shall continue and exist and be administered by the Trustee as herein provided (unless distributed by Grantor prior to his death, or distributed by Harry Holmes, Jr., John B. Holmes or Thomas J. Holmes, while they are acting as Trustees, as hereinbefore provided), for the period of fifteen (15) years from this date, provided that if, at the expiration of (15) years there are beneficiaries hereunder under the age of twenty-one (21) years, the trustee shall be continued as to such beneficiaries' share or portion of such Trust Estate until such beneficiaries shall reach the age of twenty-one (21) years, or shall die, in either of which events, the trust as to such portion shall terminate, and provided further, and it is hereby made an express condition of this trust, that the same shall terminate twenty-one (21) years after the death of the last survivor of my said sons.

Upon the termination of the trust herein created or of said respective trusts, as herein provided, the entire Trust Estate then remaining in the hands of the Trustee, whether principal or accumulated income, shall be immediately divided, distributed and paid over to the persons who are entitled to receive the same in the proportions and according to the provisions of this agreement.

60 In testimony whereof, said Harry Holmes, as Grantor and as Trustee, has executed these presents, this the 20th day of January, A. D., 1935.

HARRY HOLMES,
Grantor and Trustee.

THE STATE OF TEXAS,
County of Harris.

Before me, the undersigned authority, on this day personally appeared Harry Holmes, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed, and in the capacity therein stated.

Given under my hand and seal of office, this the 20th day of January A. D. 1935.

[SEAL] NEDRA M. PATTISON,
Notary Public in and for Harris County, Texas.

61 THE STATE OF TEXAS,
County of Harris.

I, Henry M. Dudley, Clerk of the County Court of Harris County, Texas, do hereby certify that the within instrument with its certificate of authentication was filed for registration in my office on Nov. 14, 1938, at 4:10 o'clock P. M., and duly recorded

on Nov. 22, 1938, at 11:35 o'clock A. M., in Vol. 1103, Page 411 of record of Deeds for said County.

Witness my hand and seal of office at Houston, the day and date last above written.

HENRY M. DUDLEY,
Clerk County Court, Harris County, Texas.
By BETTY HOCHULI,
Deputy.

62 In the United States Circuit Court of Appeals for the Fifth Circuit

[Title omitted.]
[File endorsement omitted.]

Praecipe for record on review

Filed Nov. 13, 1944

To the Clerk of the Tax Court of the United States

You will please prepare, transmit, and deliver to the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Fifth Circuit, heretofore filed by the Commissioner of Internal Revenue.

1. Docket entries of the proceedings before the Tax Court of the United States.
2. Pleadings before the Tax Court:
(a) Petition, including annexed copy of the deficiency notice.
(b) Answer.
63 3. Opinion and Decision of the Tax Court.
4. Petition for Review, together with proof of service of Notice of Filing Petition for Review and of service of a copy of Petition for Review.
5. Stipulation of Facts and Exhibit attached.
6. This Praecipe for record.

(Sgd.) SAMUEL O. CLARK, JR.,
Assistant Attorney General.
(Sgd.) J. P. Wenchel,
C. A. R.
J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue,
Attorneys for Petitioner on Review.

Service of a copy of the within Praecipe is admitted this 7th day of November 1944.

J. E. PRICE,
Attorney for Respondent on Review.

64 [Clerk's certificate to foregoing transcript omitted in printing.]

65 In United States Circuit Court of Appeals, Fifth Circuit

No. 11206.

COMMISSIONER OF INTERNAL REVENUE

v.

ESTATE OF HARRY HOLMES, DECEASED, LUCY B. HOLMES, INDEPENDENT EXECUTRIX

Minute entry of argument and submission

March 6, 1945

On this day this cause was called, and, after argument by Hilbert P. Zarky, Esq., Special Assistant to the Attorney General, for petitioner, and J. E. Price, Esq., for respondent, was submitted to the Court.

66 In the United States Circuit Court of Appeals for the Fifth Circuit

No. 11206

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF HARRY HOLMES, DECEASED, LUCY B. HOLMES, INDEPENDENT EXECUTRIX, RESPONDENT

Petition for Review of Decision of the Tax Court of the United States (District of Texas)

(April 14, 1945)

Before HUTCHESON, HOLMES, and MCCORD, Circuit Judges

Opinion

Filed April 14, 1945

HOLMES, Circuit Judge: This is an estate tax case involving the question whether the settlor of an irrevocable trust reserved

powers enabling him to change in enjoyment the interests created thereby, so that, upon his death without having exercised such powers, a taxable interest passed from him.

67 On January 20, 1935, Harry Holmes transferred 30 shares of stock to himself, as trustee, for the benefit of his three sons. The instrument set up three trusts, which were identical in terms. They were for a period of 15 years, unless terminated earlier by the trustee or trustees. The settlor was the trustee of each trust, with provision that, upon his death or resignation prior to the termination of the trusts, such of his sons as had then attained their majority or had their disabilities of minority removed should become joint trustees.

Each trust named as beneficiary one son, who was to receive the income therefrom during the life of the trust and the corpus upon termination thereof. If any son should die during the continuance of the trust, the beneficial interests would pass to his surviving issue, share and share alike, subject to distribution when such beneficiary or beneficiaries became 21 years of age. If any son died leaving no issue, or if his surviving issue died before becoming 21 years of age, his interest passed to his surviving brother or brothers or, if they were both dead, to their surviving issue per stirpes. If all three sons died without issue prior to termination, the whole of the trust properties then remaining passed to the settlor's wife, if living, or to her heirs at law.

The trusts provided that the trustee should distribute the net income from each trust to the beneficiary in convenient monthly installments, but that the trustee, if he deemed it to the best interest of the beneficiary, could withhold distribution of any portion of the net income, accumulate it, and turn it over to the beneficiary with the corpus upon termination of the trust. The trustee was empowered to use trust corpus when necessary or advisable for the maintenance, welfare, or happiness of the beneficiary; he could distribute said principal in whole or in

68 part whenever he deemed it advisable, or could terminate the trusts, in which event the corpus would be distributed to the persons entitled thereto on the date of termination.

Harry Holmes acted as trustee of the trusts, and did not terminate them prior to his death on October 5, 1940. His executrix did not include in the estate tax return any of the property that had been transferred to the trusts. The Commissioner, claiming that the trust property should have been included in the trust estate, assessed a deficiency. The Tax Court held that the property was not includible in the gross estate of the decedent, and the Commissioner appealed. His contention is that the reservation by the decedent of the power to terminate the trusts at will enabled him to give to the then existing beneficiaries complete

ownership of the trust corpus, and thereby to extinguish all contingent interests; and that the relinquishment of this power by the decedent at death was the first complete transfer of the grantor's control over the enjoyment of the trust benefits.

The applicable statute is Section 811 (d) of the Internal Revenue Code, which relates to revocable transfers. Subsection (1) thereof provides that the value of the gross estate of a decedent for estate tax purposes shall include the value of all property to the extent of any interest therein of which the decedent has made a transfer in trust after June 22, 1936 (except bona fide sales for an adequate consideration), where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power by the decedent to alter, amend, revoke, or terminate. Subsection (2) thereof provides that with respect to transfers on or prior to June 22, 1936, any interest so transferred is includible where the enjoyment thereof was subject, at the date of decedent's death, to any change through the exercise of a power by the decedent to alter, amend, or revoke. As the
69 present trusts were created prior to June 22, 1936, Subsection (2) of the statute, which does not expressly mention a power to terminate, is controlling in this case.

This portion of the statute was included in the Revenue Act of 1924 and each succeeding act as Section 302 (d) thereof, and has been frequently before the courts. Fifteen years after its first enactment, Mr. Justice Stone, in the case of Estate of Sanford v. Commissioner, 308 U. S. 39, reviewed the decisions of the court involving the statute, and summarized as follows: "The rule was thus established, and has ever since been consistently followed by the Court, that a transfer of property upon trust, with power reserved to the donor either to revoke it and recapture the trust property or to modify its terms so as to designate new beneficiaries other than himself is incomplete, and becomes complete so as to subject the transfer to death taxes only on relinquishment of the power at death." Since the reservation in the present case did not empower the donor either to revoke the trust instrument and recapture the trust property, or to modify the terms of that instrument so as to designate new beneficiaries or in any other manner change the fixed provisions thereof, it is patent that the Commissioner is now seeking to extend the rule beyond the bounds long established.

The Commissioner argues that the words "alter, amend, or revoke" should always have been construed to include the power to terminate, and that the addition of the word "terminate" in the 1936 act added nothing of substance to the statute, but was only declaratory of the existing law. This view is based upon the report issued by the Ways and Means Committee in connec-

tion with the enactment of the 1936 law, which report read in part as follows: "In the case of White v. Poor, 296 U. S. 98, the Supreme Court did not pass on the question whether the
70 power to terminate was included in the language relating to a power 'to alter, amend, or revoke.' Since in substance a power to terminate is the equivalent of a power to revoke, this question should be set at rest. Express provision to that effect has been made and it is believed to be declaratory of existing law."

We do not consider this report helpful to the Commissioner here. It is at once apparent that the word "terminate," if used to mean the same thing as "revoke," adds nothing of substance to the statute. In any case where the grantor retains a power called a power to terminate, but where the power when exercised is the equivalent of a revocation, the trust res should be included in the estate of the grantor under either provision of the statute. It may also be true that the power to terminate a trust is ordinarily the equivalent of a power to revoke, for in many instances the trust instrument conveys property for the life of the trust only, without any conveyance over of the res upon termination, and the effect of the termination is to nullify the grant and return the trust property to the grantor.

That the word was used in this restricted sense only is the interpretation given the statute by the Treasury. Section 81.20 of Treasury Regulations 105 provides: "Such addition is considered but declaratory of the meaning of the subdivision prior to the amendment. A power to terminate capable of being so exercised as to revest in the decedent the ownership of the transferred property or an interest therein, or as otherwise to inure to his benefit or the benefit of his estate, is, to that extent, the equivalent of a power to 'revoke.'"

Of critical importance in the case at bar is the fact that the trust instrument not only operated to convey the trust es-
71 tate, but the instrument also provided that, if the decedent exercised his power as trustee to terminate the instrument, the ownership of the properties should vest in named beneficiaries other than the grantor. The power to terminate was not capable of being so exercised as to revest in the decedent any legal or beneficial title to any interest in the trust property, nor could it operate to empower the decedent to choose different beneficiaries from those named, or to alter the benefits received by them.

The Commissioner also relies upon the case of Mellon v. Driscoll, 117 F. (2d) 477. The Tax Court thought that the *Mellon* case was distinguishable from this one on the facts. If it is not so distinguishable, then we decline to follow it. In that case the court reached its conclusion by holding, without citation of authority, that "revocation is but a method of bringing a trust to an untimely

end and has no relation to the consequent and subsequent fate of the corpus." We prefer to ascribe to the word "revoke" the meaning attributed to it by dictionaries,[1] by the Regulations,[2] and by the courts generally;[3] namely, to annul or make void by recalling or taking back; to recall a grant. Indeed, in Porter v. Commissioner, 288 U. S. 436, the contention was made that the phrase "alter, amend, or revoke" related only to such powers as were exercisable to revest the property conveyed in the grantor. The court disposed of this by saying that the words were used disjunctively, and that "alter" and "modify" were not used as equivalents of revoke, thus recognizing that a revocable transfer is one subject to being recalled by the transferor.

72 We agree with the Tax Court that the grantor did not have any power to alter, amend, or revoke, and that the trust properties were not includible in the gross estate. The decision appealed from is affirmed.

Dissenting opinion.

McCORD, Circuit Judge, dissenting:

This is an estate tax case which involves the question whether the trust from which it stems was irrevocable, or whether it falls within the inhibition of Section 811 (d) (2) of the Internal Revenue Code, 26 U. S. C. 1940 ed., Sec. 811.

Where a grantor has attempted to dispose of his property by trust, such instrument must show clearly that it is irrevocable and that grantor retains no interest in or control over such property as owned. It has been repeatedly held that if the reserve power of a grantor permits him, in any manner, to alter, amend, revoke or designate the interest of the beneficiaries named in the trust, it will be sufficient to cause the property to be included in the gross estate of such grantor. Union Trust Co. v. Driscoll, 138 F. (2) 152, cert. denied; Welch v. Terhune, 126 F. (2) 695, cert. denied; Mellon v. Driscoll, 117 F. (2) 477, cert. denied; Millard v. Maloney, 121 F. (2) 257, cert. denied.

Paragraphs four, eleven and thirteen of the trust instrument here under consideration makes it plain that the termination of the trust would accomplish much more than "to accelerate the time of its enjoyment"; that the corpus was not by the instrument "already given to the beneficiaries," but on the contrary, the grantor could "change or alter the disposition of the trust corpus"

[1] Webster's New International Dictionary; Funk & Wagnall's New Standard Dictionary.
[2] Section 81.20 of Treasury Regulations 105, supra.
[3] Reinecke v. Northern Trust Company, 278 U. S. 339; Burnet v. Guggenheim, 288 U. S. 280; Porter v. Commissioner, 288 U. S. 436; Helvering v. Helmholz, 296 U. S. 93; Estate of Sanford v. Commissioner, 308 U. S. 39; Morton v. Commissioner, 109 F. (2) 47; Commissioner v. Branch, 144 F. (2d) 985.

by transforming some contingent interests into absolute
73 ownership and thereby destroy other contingent interests altogether.

While each of the three sons named as beneficiaries was given a present interest in the income from the trust even that interest was not absolute. The grantor had the right as trustee to withhold income payments "should he determine it for the best interest of" the named beneficiaries. This, together with the spendthrift provisions, insured continuing control over the income by the grantor. Moreover, he reserved the right to terminate the trust at any time in his lifetime. If the trust were terminated in this manner, the corpus would be paid to the beneficiaries then entitled to it. Thus, by exercising his retained authority, the grantor could have changed the contingent interests of his three sons with respect to the corpus into rights of absolute ownership. By the same token, had he terminated the trust, he could have extinguished the contingent interests which each son had in his brothers' putative shares, the contingent interests which the issue, or potential issue, of each son would have, and also the contingent interest of the grantor's wife.

The grantor named himself trustee of the trust and administered the same until he died; and the instrument forbade the beneficiaries from pledging or alienating their interests until it came into their possession.

It becomes patent, I think, that this instrument does not measure to an irrevocable trust, but is a substitute for testamentary disposition, and opens the door to the makers of trust instruments through which they may escape gift, inheritance or estate taxes. Welch v. Terhune, 126 F. (2) 695.

The Tax Court has given to this instrument a crutch with
74 which it is enabled to stand upright, whereas it should have been permitted to fall because of its weaknesses and defects.

I cannot bring myself to agree with my colleagues.

75 In United States Circuit Court of Appeals,
Fifth Circuit

No. 11206

COMMISSIONER OF INTERNAL REVENUE

v.

ESTATE OF HARRY HOLMES, DECEASED, LUCY B. HOLMES, INDEPENDENT EXECUTRIX

Judgment

This cause came on to be heard on the petition of Commissioner of Internal Revenue for a review of a decision of The Tax Court of the United States, and was argued by counsel;

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decision of the said Tax Court of the United States appealed from in this cause be, and the same is hereby, affirmed.

McCORD, Circuit Judge, dissents.

76 [Clerks certificate to foregoing transcript omitted in printing.]

77 Supreme Court of the United States

Order allowing certiorari

Filed October 8, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice JACKSON and Mr. Justice BURTON took no part in the consideration or decision of this application.

[Endorsement on cover:] File No. 49,906. U. S Circuit Court of Appeals, Fifth Circuit. Term No. 203. Commissioner of Internal Revenue, Petitioner vs. Estate of Harry Holmes, Deceased, Lucy B. Holmes, Independent Executrix. Petition for a writ of certiorari and exhibit thereto. Filed July 6, 1945. Term No. 203 O. T. 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945

No. 203

In the Supreme Court of the United States

OCTOBER TERM, 1945

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF HARRY HOLMES, DECEASED, LUCY B. HOLMES, INDEPENDENT EXECUTRIX

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. —

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF HARRY HOLMES, DECEASED, LUCY B. HOLMES, INDEPENDENT EXECUTRIX

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered in this case.

OPINIONS BELOW

The opinion of the Tax Court (R. 18–31) is reported at 3 T. C. 571. The opinion of the circuit court of appeals (R. 65–69) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on April 14, 1945 (R. 70). The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The decedent transferred certain property in trust. The income beneficiaries were his three sons, or certain other contingent beneficiaries. The trust was to continue for a period of fifteen years, but under certain contingencies could terminate sooner. Also, the decedent reserved the power to terminate the trust at any time, and thereby to pay the corpus to the beneficiaries then entitled to receive it. Upon termination of the trust, the corpus was to be paid to the sons, if then living, and if not, to other contingent beneficiaries.

The question is whether the interests thus created were subject to any change in enjoyment through the exercise of a power by the decedent to alter, amend, or revoke, within the meaning of Section 811 (d) (2) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

The applicable provisions of the statute and Regulations involved are set forth in the Appendix, *infra*.

STATEMENT

The facts in this case were stipulated by the parties (R. 41–60), and were found by the Tax Court as stipulated (R. 19).

On January 20, 1935, the decedent transferred to himself, as trustee, 30 shares of the capital stock of the Quintana Petroleum Company to be held in trust for the benefit of his three sons and certain other contingent beneficiaries. (R. 41–42). This stock was a part of the community estate of the decedent and his wife (R. 42).

The trust provided (R. 50–52):[1]

> FOURTH
>
> During the lifetime of my son, Harry Holmes, Jr., and prior to the termination of the trust herein created for his benefit, the Trustee shall distribute the net income from the share or trust so allocated to my son, Harry Holmes, Jr., to him in convenient installments, preferably monthly; provided the Trustee may withhold distribution of any portion of said net income, should he determine it for the best interest of my said son, any portion of said net income so withheld to be accumulated for his benefit; provided, should my said son, Harry Holmes, Jr., die during the continuance of said trust and leave issue surviving, then, his share or trust shall be held for the benefit of his surviving issue, share and share alike. If such issue be over twenty-one (21) years of age, his or her share or portion of said trust shall be distributed and delivered to

[1] Paragraphs Fifth and Sixth (R. 52–56) provided, in substantially identical terms, for the interests of John B. Holmes and Thomas J. Holmes, the other named beneficiaries.

such beneficiary, and the trust, as it relates to such portion, shall thereupon be terminated. If any such issue shall be under the age of twenty-one (21) years, the Trustee shall use such portion of the net income on such beneficiary's share, or trust, as in the discretion of the Trustee may be deemed necessary or advisable to provide for such beneficiary's care, support, maintenance and education, until such beneficiary arrives at the age of twenty-one (21) years, any unused portion of said net income to accumulate for the benefit of such beneficiary. When such beneficiary arrives at the age of twenty-one (21) years, he or she shall receive the entire portion of the Trust Estate from which he or she shall have theretofore received the income.

If my son, Harry Holmes, Jr., shall die during the continuance of the trust so allocated to him, without leaving surviving issue, or if he shall leave such issue, but such issue shall die before reaching the age of twenty-one (21) years, then, in either of such events, the share or trust that would have gone to my said son, Harry Holmes, Jr., or his said issue, shall enure pro rata to my sons, John B. Holmes and Thomas J. Holmes, if living, and if not living, to their issue, such issue to take per stirpes. If either of my sons John B. Holmes or Thomas J. Holmes, should then be dead without issue, the whole of such share or trust shall enure to the survivor, or to the

issue of the other, to be administered and distributed in the same manner as hereinafter provided for the administration and distribution of the trust in this instrument created for the benefit of such surviving son, or his issue.

Should all of my said sons die without leaving surviving issue prior to receipt and distribution of all of the residue of this Trust Estate, then and thereupon, said residue shall be distributed to Grantor's wife, Lucy B. Holmes, if living, and if she is not then living, said residue shall be distributed to the persons who would be her legal heirs under the laws of descent and distribution of the State of Texas.

If, at any time during the continuance of this trust, it should be, in the opinion of the Trustee, necessary or advisable to use some portion of the principal herein set aside and allocated to my son, Harry Holmes, Jr., or his issue, as herein provided, for the maintenance, welfare, comfort or happiness of my said son, or his issue, or any beneficiary thereof, or for the education of any of such beneficiaries, the Trustee is hereby authorized and empowered to use so much of the principal as in the opinion of the Trustee is deemed necessary or advisable to meet such conditions; any principal so used to be charged to the beneficiary for whose benefit such use of principal is made when distribution is made hereunder. Grantor hereby suggests that

the Trustee be liberal in construing for the benefit of Grantor's said son or his surviving issue, any condition or circumstance that may require the use or distribution of said principal to provide for the maintenance, welfare, comfort or happiness of Grantor's said son or his surviving issue.

The trust instrument also provided (R. 58, 59):

ELEVENTH

Grantor, during his lifetime, and my son or sons herein named, while acting as Trustee hereunder, may, if deemed advisable by them as Trustee, distribute to either of Grantor's children, the whole or any part of the principal of their respective trusts, and their interests thereunder. And Grantor may, during his lifetime, if deemed advisable by him, and my son or sons herein named, while acting as Trustee hereunder, may, if deemed advisable by them as Trustee, terminate either or all of said trusts herein created for the respective benefit of my said sons, and distribute the principal of the trust to the persons entitled to receive the same under the terms hereof on the date of such termination.

* * * * * * *

THIRTEENTH

The several trusts herein created shall continue and exist and be administered by the Trustee as herein provided, (unless distributed by Grantor prior to his death, or distributed by Harry Holmes, Jr., John

B. Holmes or Thomas J. Holmes, while they are acting as Trustee, as hereinbefore provided, for the period of fifteen (15) years from this date, provided that if, at the expiration of fifteen (15) years there are beneficiaries hereunder under the age of twenty-one (21) years, the trustee [trust] shall be continued as to such beneficiaries' share or portion of such Trust Estate until such beneficiaries shall reach the age of twenty-one (21) years, or shall die, in either of which events, the trust as to such portion shall terminate, and provided further, and it is hereby made an express condition of this trust, that the same shall terminate twenty-one (21) years after the death of the last survivor of my said sons.

Upon the termination of the trust herein created or of said respective trusts, as herein provided, the entire Trust Estate then remaining in the hands of the Trustee, whether principal or accumulated income, shall be immediately divided, distributed and paid over to the persons who are entitled to receive the same in the proportions and according to the provisions of this agreement.

The Quintana Petroleum Company was liquidated on December 31, 1938, as a result of which a *pro rata* part of the assets of the company was conveyed to the decedent as trustee (R. 42). The decedent did not relinquish his duties as trustee, but continued to act in that capacity until the

date of his death, October 5, 1940 (R. 41, 42). In the estate tax return filed by taxpayer, the executrix of his estate, the property which had been transferred by the decedent to the trust was not returned as a part of his gross estate. The fair market value of a one-half interest in the trust assets was, at the time of the decedent's death, $91,593.17. (R. 42–43.)

The Commissioner determined a deficiency in estate tax because of the failure to have included in the decedent's gross estate, pursuant to the provisions of Section 811 (d) of the Internal Revenue Code, his community property interest in the assets of the trust (R. 8–15). The taxpayer sought a redetermination of the deficiency before the Tax Court. The Tax Court ruled that the property was not includible in the decedent's gross estate and decided that there was no deficiency in estate tax (R. 19–31). The circuit court of appeals, Judge McCord dissenting, affirmed the decision of the Tax Court (R. 65–70).

SPECIFICATION OF ERROR TO BE URGED

The circuit court of appeals erred in holding that the transfers made by the decedent were not required to be included in his gross estate under Section 811 (d) of the Internal Revenue Code.

REASONS FOR GRANTING THE WRIT

1. The decision below is in conflict with *Mellon* v. *Driscoll*, 117 F. 2d 477 (C. C. A. 3), certiorari

denied, 313 U. S. 579, and *Commissioner* v. *Hofheimer* (C. C. A. 2), decided May 25, 1945, not yet reported. The Tax Court undertook (R. 28) to distinguish the *Mellon* case, on the ground that there "the exercise of the power of revocation or termination meant a new conveyance of the corpus to the beneficiaries," whereas here "an exercise by the settlor of his power to terminate the trust meant only an acceleration of the time of enjoyment." We are unable to perceive either validity or significance in the purported distinction; and the circuit court of appeals placed no reliance thereon. Referring to the Tax Court's effort to distinguish the *Mellon* case, the court said merely (R. 68): "If it is not so distinguishable, * * * we decline to follow it." The decision below rests on a construction of the statute explicitly stated to be contrary to that adopted in the Third Circuit.

2. The decision below was erroneous. All the interests created by the decedent were subject to changes in enjoyment by the exercise of his retained power to terminate the trust, since the exercise of this power would have altered or amended the transfer made and the interests created thereunder. The trust instrument gave the decedent's sons, the named beneficiaries, only a present interest in the income of the trust, subject to spendthrift limitations. In the absence of action by the trustees, each of the named bene-

ficiaries had to be in existence at the time of the termination of the trust in order to acquire any ownership rights in the corpus. Also, each of the beneficiaries, including those not specifically named, had a contingent, but more remote, interest in the corpus which might ripen into ownership if one or more of the named beneficiaries should not survive the duration of the trust. Thus, until termination of the trust, it could not be ascertained who would share in the trust corpus, or how the property would be apportioned among those entitled to take.

If the decedent had exercised his reserved authority to terminate the trust, he would have transformed the contingent interests of the named beneficiaries into complete and absolute ownership. Likewise, his action in this regard would have destroyed the contingent rights of each person who otherwise might have acquired ownership rights had any of the gifts over taken effect.

All the beneficial interests created were thus subject to a change in enjoyment by the decedent's authority to alter or amend those interests and the transfer under which they were created. Since the trust at the time of his death was still subject to change through the exercise of this power, the provisions of Section 811 (d) (2) of the Internal Revenue Code (Appendix, *infra*) clearly require that the value of the prop-

erty transferred be included in the decedent's gross estate.

3. The decision below was reached by disregarding the construction of the statute made in a valid Treasury regulation. The circuit court of appeals construed the phrase "alter, amend, or revoke" in Section 811 (d) (2) as not including the authority to terminate a trust, in the manner involved here, unless the power, when exercised, be equivalent to revocation. It gave a similar interpretation to Section 811 (d) (1) of the Internal Revenue Code (Appendix, *infra*), applicable to transfers made after June 22, 1936, containing the phrase "alter, amend, revoke, or terminate." The word "terminate" was added by Section 805 of the Revenue Act of 1936, c. 690, 49 Stat. 1648, as a clarifying amendment to restate existing law. See H. Rep. No. 2818, 74th Cong., 2d Sess., p. 10. In this respect, Section 81.20 of Treasury Regulations 105 (Appendix, *infra*) provides:

> The third change made in the subdivision by the Revenue Act of 1936 (which is also embodied in subsection (d) (1) of section 811 of the Internal Revenue Code) consists of the addition of the words "or terminate" following the words "to alter, amend, revoke." Such addition is considered but declaratory of the meaning of the subdivision prior to the amendment. A

> power to terminate capable of being so exercised as to revest in the decedent the ownership of the transferred property or an interest therein, or as otherwise to inure to his benefit or the benefit of his estate, is, to that extent, the equivalent of a power to "revoke," *and when otherwise so exercisable as to effect a change in the enjoyment, is the equivalent of a power to "alter."* [Italics supplied.]

In concluding that a power to terminate a trust is covered by the statute, both before and after the 1936 amendment, only when its exercise would be equivalent to a power to revoke, the court below quoted the Regulation in support of its view (R. 68). However, its quotation was only partial; it failed to quote the portion of the Regulation which appears above in italics. The italicized portion of the Regulation plainly demonstrates that the transfer here involved must be included in the decedent's gross estate, since the power to terminate the trust could have effectuated changes in enjoyment of the interests created, and was therefore "the equivalent of a power to 'alter'."

4. So far as the court below placed importance on the fact that the decedent's retained authority could not be used to benefit himself or his estate, or to choose different beneficiaries, its decision also conflicts with *Porter* v. *Commissioner*, 288

U. S. 436, and *Millard* v. *Maloney*, 121 F. 2d 257 (C. C. A. 3), certiorari denied, 314 U. S. 636.

5. The decision in this case presents a question of importance in the administration of the estate tax law. The circuit court agreed with the Commissioner's contention that the addition of the word "terminate" by Section 805 of the Revenue Act of 1936, *supra*, was merely declaratory of existing law and did not change the meaning of the statute—although it disagreed with the Commissioner as to what that meaning was. The decision below, therefore, if not reversed, will be urged as a precedent, and in the Fifth Circuit at least will presumably be followed, in the case of similar transfers made after June 22, 1936 (governed by Section 811 (d) (1) of the Internal Revenue Code).

CONCLUSION

The decision below is erroneous. There is a conflict in decisions on a question of importance which is likely to recur. An interpretation of the statute embodied in a valid Treasury regulation has been ignored. For the foregoing reasons, it is respectfully submitted that this petition should be granted.

HUGH B. COX,
Acting Solicitor General.

JULY 1945.

APPENDIX

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * * *

(d) *Revocable transfers*—(1) *Transfers after June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona-fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death;

(2) *Transfers on or prior to June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the de-

cedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a transfer shall be included in the gross estate under paragraph (1) unless it is includible under this paragraph;

(26 U. S. C., Sec. 811.)

* * * * *

Treasury Regulations 105, promulgated under the estate tax provisions of the Internal Revenue Code:

SEC. 81.15 *Transfers during life.*—The following classes of transfers made by the decedent prior to his death, whether in trust or otherwise, if not constituting bona fide sales for an adequate and full consideration in money or money's worth, are subject to the tax: * * * (5) transfers under which the enjoyment of the transferred property was subject at decedent's death to a change through the exercise, either by the decedent alone or in conjunction with another person or persons, of a power to alter, amend, revoke, or terminate, or where such a power was relinquished in contemplation of decedent's death (see sections 81.20 and 81.21).

* * * * *

SEC. 81.20. *Transfers with power to change the enjoyment.*—(a) *Transfers included.*—Subsection (d) of section 811 embraces a transfer by trust or otherwise (if not amounting to a bona fide sale for an adequate and full consideration in money

or money's worth) when at the time of decedent's death the enjoyment of the transferred property, or some part thereof or interest therein, was subject to any change through a power exercisable either by the decedent alone, or by him in conjunction with some other person or persons, to alter, or amend, or revoke, or terminate. (See section 81.15.)

The addition to subdivision (d) (1) of the Revenue Act of 1926, by section 805 of the Revenue Act of 1936, of the phrase to the effect that it is not material in what capacity the power was subject to exercise by the decedent or by the other person or persons in conjunction with the decedent (which phrase is also embodied in subsection (d) (1) of section 811 of the Internal Revenue Code), is considered merely declaratory of the meaning of the subdivision prior to the addition of the phrase.

The second phrase added to this subdivision of the Revenue Act of 1926 by amendment in 1936 (also embodied in section 811 (d) (1) of the Internal Revenue Code), namely, "without regard to when or from what source the decedent acquired such power," is not considered declaratory of the meaning of the subdivision prior to the amendment in a case in which no one of the powers enumerated in the subdivision was reserved at the time of the making of the transfer, but one or more thereof were conferred subsequent thereto (whatever the source from which conferred) without any understanding, expressed or implied, had in connection with the making of the transfer that such power or powers should be later conferred.

The third change made in the subdivision by the Revenue Act of 1936 (which is also embodied in subsection (d) (1) of section 811 of the Internal Revenue Code) consists of the addition of the words "or terminate" following the words "to alter, amend, revoke." Such addition is considered but declaratory of the meaning of the subdivision prior to the amendment. A power to terminate capable of being so exercised as to revest in the decedent the ownership of the transferred property or an interest therein, or as otherwise to inure to his benefit or the benefit of his estate, is, to that extent, the equivalent of a power to "revoke," and when otherwise so exercisable as to effect a change in the enjoyment, is the equivalent of a power to "alter."

U. S. GOVERNMENT PRINTING OFFICE: 1949

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No. 203

In the Supreme Court of the United States

OCTOBER TERM, 1945

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF HARRY HOLMES, DECEASED, LUCY B. HOLMES, INDEPENDENT EXECUTRIX

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

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No. 203

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

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ESTATE OF HARRY HOLMES, DECEASED, LUCY B. HOLMES, INDEPENDENT EXECUTRIX

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Tax Court (R. 11–20) is reported at 3 T. C. 571. The opinion of the Circuit Court of Appeals (R. 39–43), and the dissenting opinion of Judge McCord (R. 43–44), are reported at 148 F. 2d 740.

JURISDICTION

The judgment of the Circuit Court of Appeals (R. 44–45) was entered on April 14, 1945. The petition for a writ of certiorari was filed on July 6, 1945, and was granted on October 8, 1945 (R. 45). The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The decedent transferred certain property in trust. The income beneficiaries were his three sons, or certain other contingent beneficiaries. The grantor, as trustee, had the power to withhold income payments from the sons, as he determined to be for their best interests; he could also invade the corpus for the maintenance, comfort, welfare or happiness of the sons or of any other income beneficiary. The trust was to continue for a period of fifteen years, but under certain contingencies might continue for a longer time. Upon termination of the trust, the corpus was to be paid to the sons, if then living, and if not, to other contingent beneficiaries. The decedent reserved the power to terminate the trust at any time, and thereby to pay the corpus to the beneficiaries then entitled to receive it.

The question is whether the interests thus created were subject to changes in enjoyment through the exercise of a power by the decedent to alter, amend, or revoke, within the meaning of Section 811 (d) (2) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

The applicable provisions of the statute and regulations involved are set forth in the Appendix, *infra*, pp. 42–45.

STATEMENT

The facts in this case were stipulated by the parties (R. 25–38), and were found by the Tax Court as stipulated (R. 12).

On January 20, 1935, the decedent transferred to himself, as trustee, and to the successor trustees which were provided for, thirty shares of the capital stock of the Quintana Petroleum Company to be held in trust in equal shares for the benefit of his three sons and certain other contingent beneficiaries (R. 25). This stock was a part of the community estate of the decedent and his wife (R. 25).

Paragraphs Fourth, Fifth and Sixth of the trust instrument (R. 31–35) provided, in substantially identical terms, for the interests of each of the decedent's three sons and for the interests of other contingent beneficiaries. Thus, as to the share of Harry Holmes, Junior, the trust provided (R. 31–32):

> FOURTH
>
> During the lifetime of my son, Harry Holmes, Jr., and prior to the termination of the trust herein created for his benefit, the Trustee shall distribute the net income from the share or trust so allocated to my son, Harry Holmes, Jr., to him in convenient installments, preferably monthly; provided the Trustee may withhold distribution of any portion of said net income, should he determine it for the best interest

of my said son, any portion of said net income so withheld to be accumulated for his benefit; provided, should my said son, Harry Holmes, Jr., die during the continuance of said trust and leave issue surviving, then, his share or trust shall be held for the benefit of his surviving issue, share and share alike. If such issue be over twenty-one (21) years of age, his or her share or portion of said trust shall be distributed and delivered to such beneficiary, and the trust, as it relates to such portion, shall thereupon be terminated. If any such issue shall be under the age of twenty-one (21) years, the Trustee shall use such portion of the net income on such beneficiary's share, or trust, as in the discretion of the Trustee may be deemed necessary or advisable to provide for such beneficiary's care, support, maintenance, and education, until such beneficiary arrives at the age of twenty-one (21) years, any unused portion of said net income to accumulate for the benefit of such beneficiary. When such beneficiary arrives at the age of twenty-one (21) years, he or she shall receive the entire portion of the Trust Estate from which he or she shall have theretofore received the income.

If my son, Harry Holmes, Jr., shall die during the continuance of the trust so allocated to him, without leaving surviving issue, or if he shall leave such issue, but such issue shall die before reaching the age of twenty-one (21) years, then, in either of

such events, the share or trust that would have gone to my said son, Harry Holmes, Jr., or his said issue, shall enure pro rata to my sons, John B. Holmes and Thomas J. Holmes, if living, and if not living, to their issue, such issue to take per stirpes. If either of my sons John B. Holmes or Thomas J. Holmes, should then be dead without issue, the whole of such share or trust shall enure to the survivor, or to the issue of the other, to be administered and distributed in the same manner as hereinafter provided for the administration and distribution of the trust in this instrument created for the benefit of such surviving son, or his issue.

Should all of my said sons die without leaving surviving issue prior to receipt and distribution of all of the residue of this Trust Estate, then and thereupon, said residue shall be distributed to Grantor's wife, Lucy B. Holmes, if living, and if she is not then living, said residue shall be distributed to the persons who would be her legal heirs under the laws of descent and distribution of the State of Texas.

If, at any time during the continuance of this trust, it should be, in the opinion of the Trustee, necessary or advisable to use some portion of the principal herein set aside and allocated to my son, Harry Holmes, Jr., or his issue, as herein provided, for the maintenance, welfare, comfort or happiness of my said son, or his issue, or any beneficiary thereof, or for the

education of any of such beneficiaries, the Trustee is hereby authorized and empowered to use so much of the principal as in the opinion of the Trustee is deemed necessary or advisable to meet such conditions; any principal so used to be charged to the beneficiary for whose benefit such use of principal is made when distribution is made hereunder. Grantor hereby suggests that the Trustee be liberal in construing for the benefit of Grantor's said son or his surviving issue, any condition or circumstance that may require the use or distribution of said principal to provide for the maintenance, welfare, comfort or happiness of Grantor's said son or his surviving issue.

The trust instrument also provided (R. 36, 37):

ELEVENTH

Grantor, during his lifetime, and my son or sons herein named, while acting as Trustee hereunder, may, if deemed advisable by them as Trustee, distribute to either of Grantor's children, the whole or any part of the principal of their respective trusts, and their interests thereunder. And Grantor may, during his life-time, if deemed advisable by him, and my son or sons herein named, while acting as Trustee hereunder, may, if deemed advisable by them as Trustee, terminate either or all of said trusts herein created for the respective benefit of my said sons, and distribute the principal of the trust to the persons en-

titled to receive the same under the terms hereof on the date of such termination.

* * * * * * *

THIRTEENTH

The several trusts herein created shall continue and exist and be administered by the Trustee as herein provided (unless distributed by Grantor prior to his death, or distributed by Harry Holmes, Jr., John B. Holmes or Thomas J. Holmes, while they are acting as Trustees, as hereinbefore provided), for the period of fifteen (15) years from this date, provided that if, at the expiration of fifteen (15) years there are beneficiaries hereunder under the age of twenty-one (21) years, the trustee [trust] shall be continued as to such beneficiaries' share or portion of such Trust Estate until such beneficiaries shall reach the age of twenty-one (21) years, or shall die, in either of which events, the trust as to such portion shall terminate, and provided further, and it is hereby made an express condition of this trust, that the same shall terminate twenty-one (21) years after the death of the last survivor of my said sons.

Upon the termination of the trust herein created or of said respective trusts, as herein provided, the entire Trust Estate then remaining in the hands of the Trustee, whether principal or accumulated income, shall be immediately divided, distributed and paid over to the persons who are en-

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titled to receive the same in the proportions and according to the provisions of this agreement.

The Quintana Petroleum Company was liquidated on December 31, 1938, as a result of which a *pro rata* part of the assets of the company was conveyed to the decedent as trustee (R. 25). The decedent did not relinquish his duties as trustee, but continued to act in that capacity until the date of his death, October 5, 1940 (R. 25). In the estate tax return filed by taxpayer, the executrix of the decedent's estate, the property which had been transferred by the decedent to the trust was not returned as a part of his gross estate (R. 26). The fair market value of a one-half interest in the trust assets was, at the time of the decedent's death, $91,593.17 (R. 25).

The Commissioner determined a deficiency in estate tax because of the taxpayer's failure to include in the decedent's gross estate, pursuant to the provisions of Section 811 (d) of the Internal Revenue Code, his community property interest in the assets of the trust (R. 5–9). The taxpayer sought a redetermination of the deficiency before the Tax Court, which ruled that the property was not includible in the decedent's gross estate and decided that there was no deficiency in estate tax (R. 11–20). The Circuit Court of Appeals, Judge McCord dissenting, affirmed the decision of the Tax Court (R. 39–44).

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that the transfers made by the decedent were not required to be included in his gross estate under Section 811 (d) (2) of the Internal Revenue Code.

SUMMARY OF ARGUMENT

The decedent established a trust wherein he created interests, the beneficiaries of which were only contingently entitled to enjoyment of the corpus or the income therefrom. To acquire full ownership of the corpus, the beneficiaries were required, under the trust instrument, to be alive at the time when the property became distributable. If any named beneficiary was not in existence at that time, other contingent beneficiaries would succeed to their rights. The contingent right of the beneficiaries were made even more uncertain because the decedent could withhold and accumulate income payments, and could invade the principal for the benefit of the income beneficiaries. The decedent, moreover, reserved the power to distribute the corpus during his lifetime and, thereby, to give present ownership to known beneficiaries and to extinguish the rights of all other unknown, contingent beneficiaries.

The decedent did not exercise his power to make a complete transfer of the property during his lifetime. Only when death terminated the decedent's powers, was there a completed transfer from him. The enjoyment of all the beneficial

interests was, at the time of his death, subject to change through the exercise of decedent's reserved powers, and the legislative history of the governing statute and the regulations promulgated thereunder make it clear that these reserved powers constituted a power to "alter, amend, or revoke" within the meaning of Section 811 (d) (2) of the Internal Revenue Code.

By the terms of the trust instrument, the decedent reserved to himself, in his individual capacity, a right to terminate the trust. However, even if the instrument can be construed to mean that this power was exercisable by the decedent in his capacity as trustee, Section 811 (d) (2) of the Internal Revenue Code is nevertheless applicable.

ARGUMENT

Section 811 (d) (2) of the Internal Revenue Code requires that the decedent's interest in the trust property be included in his gross estate

Section 811 (d) (2) of the Internal Revenue Code (Appendix, *infra*, pp. 42–43) requires that there be included in a decedent's gross estate the value of any interest transferred by him during his lifetime if, at the date of his death, the enjoyment of the interest created was subject to change through the exercise by him of a power to alter, amend, or revoke.

A. *The interests of the beneficiaries of the trust were subject to changes in enjoyment at the time of the decedent's death.*—Each of the interests

in the trust created by the decedent in this case was subject to changes in enjoyment which he could have brought about during his lifetime if he had exercised the powers reserved to him in the trust instrument. Because the decedent died without having exercised his powers, the created interests were no longer susceptible to changes in enjoyment on account of his authority, and only when death terminated his authority was there a completed transfer from him of property which was subject to his control during his lifetime. As a result, the clear provisions of the statute necessitate that the value of the property conveyed in trust (to the extent of the decedent's community property interest) be included in his gross estate.

The provisions of the trust instrument plainly demonstrate that, until the time of his death, the decedent could have caused a transformation in the enjoyment of the interests of each beneficiary. The trust named the decedent as trustee (R. 26–27), and provided that the corpus should be divided into three equal shares for each of the decedent's three sons, their surviving issue and the other beneficiaries provided for in the instrument (R. 30–32). The provisions of the trust instrument with respect to each of the three shares were, except for names, identical (R. 31–35). It was provided that the income from each share should be paid to the designated son during the continuance of the trust. If the son should die

leaving surviving issue, the income would be paid to such issue,[1] but if there were none, then it would be paid to the decedent's other two children, or their surviving issue.[2] (R. 31–32.) The trustee was authorized to withhold income payments from any son and to accumulate for the son's benefit the amounts withheld (R. 31); also, spendthrift limitations prevented anticipatory disposition by the sons of the trust income prior to actual receipt (R. 35).

The separate portions of the trust corpus were to be distributed to each of the decedent's three children who survived the duration of the trust (R. 31–32, 36, 37). Prior to that time, they were prevented, on account of the spendthrift provisions, from anticipating in any manner their possible right to receive the corpus (R. 35). If any son should fail to survive the duration of the trust, the share would go to such of his issue as survived the age of 21; if any son died during the continuance of the trust without leaving surviving issue, or if all his issue died during that time before attaining their majority, the share would be distributed on the termination of the trust to the decedent's other two children, or their

[1] If the issue were over the age of 21, the corpus would be distributed to them immediately; otherwise, the income would be used for purposes of maintenance and support of issue under 21, the corpus and accumulated income being distributable as each attained his majority (R. 31–32).

[2] See note 1, *supra*.

surviving issue (R. 31). If all the decedent's children died before the termination of the trust without leaving surviving issue, or if all their issue died under the age of 21, the corpus was to be distributed to the decedent's widow, or to her lawful heirs (R. 32).

The trust, by its terms, was to be in existence for a period of fifteen years, except that, at the expiration of that time, if there were beneficiaries under the age of 21 years the trust would continue with respect to their interests until they reached their majority or died. At all events, the trust was to terminate within 21 years after the death of the last survivor of the decedent's sons (R. 37).

The authority retained by the decedent which, the Commissioner contends, brings the value of the decedent's community interest in the trust property into the gross estate by reason of the provisions of Section 811 (d) (2) of the Internal Revenue Code (Appendix, *infra,* pp. 42–43) is set forth principally in paragraph Eleventh of the trust instrument (R. 36). The decedent was therein empowered, during his lifetime, to "distribute to either of Grantor's children, the whole or any part of the principal of their respective trusts, and their interests thereunder" and he was further authorized to "terminate either or all of said trusts * * * and distribute the principal of the trust to the persons entitled to

receive the same under the terms hereof on the date of such termination."

It can only be concluded that, until the trust terminated by its own terms, the beneficiaries, whether named or not, did not have a present interest in the corpus of the trust which was capable of immediate enjoyment in any respect, the spendthrift provisions preventing any anticipatory enjoyment. Only by surviving the duration of the trust could a beneficiary, whether named or not, acquire any ownership rights in a share of the corpus. Also, the amount of the corpus which any surviving beneficiary would acquire upon termination of the trust would be determined by the number of other eligible beneficiaries then in existence. Thus, until the time for distribution arrived, the beneficiaries who would be entitled to the corpus could not be ascertained and, until that time, it could not be known how the corpus would be apportioned among them.[3]

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[3] If nomenclature of the law of property is employed, the interest of each son in one-third of the corpus could be classified as "vested subject to complete defeasance," and the interest of each son in the remaining two-thirds of the corpus and the interests of each unnamed beneficiary could be classified as "subject to a condition precedent." *Restatement of the Law of Property* (1936), Section 157. For convenience, the word "contingent" is sometimes used in the brief to describe both types of interests because of the uncertainties to which each are subject.

The changes in enjoyment which the decedent could have brought about during his lifetime by exercising his right to make completed gifts of the corpus to his sons (or to other beneficiaries, if his sons had not lived), are readily apparent. The wholly contingent and speculative rights of the decedent's sons to acquire future possession and enjoyment of the trust corpus could have been transformed by the decedent into rights of present and complete ownership. By the same token, if the decedent had utilized his reserved powers, he could have extinguished the contingent interests which each son would have in his brothers' putative shares of the corpus, the contingent interests in the corpus of the issue, or potential issue, of each son, and also the contingent interests of the decedent's wife and her heirs. The fact that each son, after the decedent's death, still possessed only the possibility of coming into possession and enjoyment of a share of the corpus is due to the decedent's forbearance and abstention from making completed gifts prior to his death. If, after the decedent's death, any of the sons should take more than one-third of the corpus, or if their issue or the decedent's wife should ever come into possession of a portion or all of the trust estate, their enjoyment will be directly traceable to the fact that the decedent did not extinguish their contingent interests as he might have done under the trust instrument.

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The same effect on the beneficial interests, which would have ensued from an exercise of the decedent's authority under Paragraph Eleventh, would have also resulted to the extent that the decedent might have invaded the corpus for the comfort, education, maintenance, welfare or happiness of any income beneficiary, as he was authorized to do (R. 32). The use of the corpus in this manner would have also resulted in the decedent giving away all or part of the corpus during his lifetime and in taking that amount of the property from those who might have become entitled to receive the gifts over.[4]

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[4] The decision of the Tax Court in the present case may be contrasted with *Estate of Nettleton* v. *Commissioner*, 4 T. C. 987, where the value of the remainder was held to be taxable under Section 811 (d) (2) of the Internal Revenue Code because the decedent could use, in his discretion, part of the trust corpus for the welfare of the life tenant. The Tax Court said (p. 991):

"The reservation of this right constituted a string upon the enjoyment of the beneficial interests and a power to change the enjoyment of those interests. The share of the remaindermen could be diminished by decedent as trustee in favor of his daughter, the life tenant, to whatever extent he considered 'suitable and necessary in the interests and for the welfare' of the daughter."

It is not possible to harmonize the decisions of the Tax Court in that case and in the present case. The identity of the remainderman there, as here, was not ascertainable when the trust was created or when the decedent died. Since the decedent here could diminish the share of the remaindermen by using the corpus for the income beneficiaries, the cases are irreconcilable in that respect. In the present case the donor reserved even greater powers than in the *Nettleton* case for

The above-described subjection of the beneficial interests in the trust to the decedent's powers to ensure or eliminate their enjoyment can hardly be described, with any accuracy, as a subjection of these interests to a mere power to accelerate enjoyment. Cf. R. 20.[5] There are few situations to which the statutory language could more aptly apply than to the changes in enjoyment to which the beneficial interests in this case were subject because of the decedent's reserved power to alter, amend or revoke them.

The Circuit Court of Appeals, however, concluded that the decedent's authority did not come within the provisions of Section 811 (d) (2) of the Internal Revenue Code, stating (R. 42):

> Of critical importance in the case at bar is the fact that the trust instrument not only operated to convey the trust estate, but the instrument also provided that, if the decedent exercised his power as trustee to terminate the instrument, the ownership of the properties should vest in named beneficiaries other than the grantor. The power to terminate was not capable of being so exercised as to revest in the decedent any legal

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here, as discussed in the body of the brief, he was authorized to extinguish the remainders completely.

[5] It is not necessary to decide, in this case, whether a decedent's power merely to accelerate enjoyment will bring the interest subjected to that power into the gross estate. It is difficult, moreover, to envisage a situation involving only acceleration and without any other changes in enjoyment.

> or beneficial title to any interest in the trust property, nor could it operate to empower the decedent to choose different beneficiaries from those named, or to alter the benefits received by them.[6]

The first consideration relied on by the court below, namely, that the decedent did not reserve the power to benefit himself or to recapture the property is not of "critical importance", for it is settled that the absence of the possibility of reacquisition will not prevent the transfer from being taxed at death. *Porter* v. *Commissioner*, 288 U. S. 436. The second point which the court thought persuasive is also contrary to authority. While this Court has not had occasion to consider the matter directly, it has unanimously been held in other circuits that the statute is operative even though the decedent is not empowered to select any new beneficiaries and even though he can change the enjoyment of only those interests which were created by the instrument. *Chickering* v. *Commissioner*, 118 F. 2d 254 (C. C. A. 1st), certiorari denied, 314 U. S. 636; *Commissioner* v. *Hofheimer's Estate*, 149 F. 2d 733 (C. C. A. 2nd);

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[6] The court similarly stated (R. 41):

"Since the reservation in the present case did not empower the donor either to revoke the trust instrument and recapture the trust property, or to modify the terms of that instrument so as to designate new beneficiaries or in any other manner change the fixed provisions thereof, it is patent that the Commissioner is now seeking to extend the rule beyond the bounds long established."

Commissioner v. *Bridgeport City Trust Co.*, 124 F. 2d 48 (C. C. A. 2nd), certiorari denied, 316 U. S. 672; *Guggenheim* v. *Helvering*, 117 F. 2d 469 (C. C. A. 2nd), certiorari denied, 314 U. S. 621; *Commissioner* v. *Chase Nat. Bank*, 82 F. 2d 157 (C. C. A. 2nd), certiorari denied, 299 U. S. 552; *Union Trust Co. of Pittsburgh* v. *Driscoll*, 138 F. 2d 152 (C. C. A. 3d), certiorari denied, 321 U. S. 764; *Millard* v. *Maloney*, 121 F. 2d 257 (C. C. A. 3rd), certiorari denied, 314 U. S. 636; *Mellon* v. *Driscoll*, 117 F. 2d 477 (C. C. A. 3rd), certiorari denied, 313 U. S. 579; *Cook* v. *Commissioner*, 66 F. 2d 995 (C. C. A. 3rd), certiorari denied, 291 U. S. 660; *Holderness* v. *Commissioner*, 86 F. 2d 137 (C. C. A. 4th).[1]

It is submitted that the view of the statute taken in the above cited cases, and not that of the court below, is the only permissible one. Even where the decedent has limited himself to choosing between beneficiaries whose interests have already been created by the instrument and to designating or altering what each will receive, his control remains dominant. In such a situation the *inter vivos* transfer is purely tentative and the decedent

[1] *Commissioner* v. *Ballard*, 138 F. 2d 512 (C. C. A. 2d), affirming 47 B. T. A. 784, and *Helvering* v. *Tetzlaff*, 141 F. 2d 8 (C. C. A. 8th), relied on by the taxpayer in the court below, are not contrary. In those cases the decedents' reserved powers were subject to conditions which had not occurred and it was decided that the power to alter, amend, or revoke did not actually exist at the time of death.

relinquishes all authority over the disposition of the property only when he utilizes his power of selection or when his death extinguishes his control. In the latter event the gift becomes, as a practical matter, effective at or after the decedent's death and the statute requires that the property transferred be taxed as part of his estate.* While in *Porter* v. *Commissioner*, 288 U. S. 436, the decedent could have chosen new beneficiaries to the exclusion of those named in the instrument, the language of the opinion is equally applicable to the powers reserved in this case and in the above cited cases; the Court said (p. 444):

> But the reservation here may not be ignored, for, while subject to the specified limitation, it made the settlor dominant in respect of other dispositions of both corpus and income. His death terminated that control, ended the possibility of any change

* One need only read the statute to conclude that it is of no consequence that the beneficial interests may remain contingent after the decedent's death. The significant fact is that the transfer from the decedent does not become complete during his lifetime and that the property passes from him completely at his death because of the extinction thereby of his reserved power to subject the previously created interests to changes in enjoyment. Thus, the decedent, at his death, has made a complete disposition of the property even though, at that time, the interests may still be subject to other contingencies. Under the statute, it is enough if, at the date of death, the enjoyment of any interest is subject to any change through the exercise of the decedent's power to "alter, amend, or revoke."

> by him, and was, in respect of title to the property in question, the source of valuable assurance passing from the dead to the living. That is the event on which Congress based the inclusion of property so transferred in the gross estate as a step in the calculation to ascertain the amount of what in § 301 is called the net estate. Thus was reached what it reasonably might deem a substitute for testamentary disposition.

In the present case, too, if any of the sons should die during the duration of the trust, the interest which will go to his issue, or to the other beneficiaries of the gifts-over, will have as its generating source the fact that death terminated the decedent's control and brought to an end his ability to make complete gifts during his lifetime to his then living children.[8]

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[8] Subsections (c) and (d) of Section 811 of the Internal Revenue Code are, to some extent, similar in reaching transfers where the interests created are endowed with whatever certainty they possess by the grantor's death. It seems apparent that, so far as the beneficial interests are concerned, the effect of the decedent's death may be the same regardless of whether that has released his control, covered by subsection (d), or his reserved property rights, covered by subsection (c). Except for the difference in what was retained by the grantor in these cases, the following language might be equally applicable to the effect of the decedent's death here on the beneficial interests in the trust property. Thus, in *Fidelity Co.* v. *Rothensies*, 324 U. S. 108, it was stated (pp. 110–111):

"'* * * The taxable event is a transfer *inter vivos*. But the measure of the tax is the value of the transferred property at the time when death brings it into enjoyment.' Cf. *Reinecke* v.

The third consideration mentioned in the previously quoted excerpt from the opinion below, namely, that the decedent could not alter the benefits received by the beneficiaries, is in direct contradiction of the terms of the trust instrument.[10] As we have already shown (*supra*, pp. 11–17), the decedent could have brought about very substantial changes in the interests of each beneficiary. The importance of the decedent's ability to make such a choice was aptly described in *Commissioner* v. *Hofheimer's Estate*, 149 F. 2d 733, 736 (C. C. A. 2nd):

Northern Trust Co., 278 U. S. 339, 347. The taxable gross estate, in other words, must include those property interests the ultimate possession or enjoyment of which is held in suspense until the moment of the grantor's death or thereafter."

Also, in *Goldstone* v. *United States*, No. 692, October Term, 1944, decided June 11, 1945, not yet reported, this Court said:

"The essential element in this case, therefore, is the decedent's possession of a reversionary interest at the time of his death, delaying until then the determination of the ultimate possession or enjoyment of the property. The existence of such an interest constitutes an important incident of ownership sufficient by itself to support the imposition of the estate tax. *Helvering* v. *Hallock*, *supra*. The indefeasibility of that interest prior to death or the decedent's possession of other powers of ownership is unnecessary and indecisive of estate tax liability."

[10] The Tax Court likewise misconstrued the interests of the beneficiaries. It concluded that the decedent's sons had an interest which was "irrevocably vested," that the decedent could only cause "an acceleration of the time of [their] enjoyment" (R. 18) and that the decedent could not "change or alter the disposition of the trust corpus already given" to them. (R. 18.)

> The Tax Court held, however, that the remainder interests were not includible because no power to alter the remaindermen was reserved. It is true that they could not directly be changed and that in respect to them the exercise of the power to terminate the trusts would but accelerate the date of distribution. Whether that would make a difference in the identity of the takers could not be known before the decedent died since it could not before then be known whether they would be the same, whenever he might terminate the trust, as they would be at his death. This power to accelerate was not only the power to provide that the same remaindermen would get at an earlier date what they were entitled to receive eventually in the same amounts; but was a power to make sure that his living children would have the enjoyment of remainders which otherwise they might not get at all. In this respect it was not a power to bring about merely a slight or trivial change. It enabled the decedent to provide for his children to the extent of their remainder interests immediately as of any time before his death when their circumstances or any other motive might prompt him to do so. * * *

Also, the changes in enjoyment which the decedent could have achieved in this case may be contrasted with those that the decedent could have brought about in *Mellon* v. *Driscoll,* 117 F. 2d 477 (C. C. A.

3d), certiorari denied, 323 U. S. 579, where the transfer was held taxable at death even though the only change which the grantor could have brought about was to give to his children full ownership of property with respect to which they already had a life interest and the power of testamentary disposition, both of which had been irrevocably given. We believe, therefore, that the court below was manifestly in error insofar as its decision rests on the assumption that the decedent in this case could not materially alter the benefits received by the beneficiaries.

B. *The decedent had the power to "alter, amend, or revoke".*—The court below concluded that the decedent here did not retain the power to "alter, amend, or revoke," as that phrase is used in Section 811 (d) (2) of the Internal Revenue Code. It would seem that the court placed undue emphasis on the fact that part of the decedent's reserved authority to make completed gifts to his sons was phrased in terms of the power to "terminate"; and also that it overlooked the fact that the powers reserved in paragraphs Fourth and Eleventh of the instrument gave the decedent the additional authority to distribute part or all of the corpus to any of his sons without terminating the trust with respect to the remainders.

That the decedent could have exercised his control by terminating the trust should not obscure the fact that he would have thereby "altered"

or "amended" some of the interests created and would have also "revoked" all other interests.[11] The history of the legislation and the administrative construction adopted by the Treasury Department demonstrate the invalidity of the lower court's decision.

In *White* v. *Poor*, 296 U. S. 98, the question was raised whether the phrase "alter, amend, or revoke" included the power of a decedent to terminate the trust where that would cause the corpus to be returned to her. This Court decided that the transfer was not taxable because the decedent's control had not been reserved when the original transfer was made, but rather that her authority resulted from her subsequent appointment as a trustee by the beneficiaries and other trustees. As a result, the question concerning the meaning of the statutory language was not considered. In order to clarify and settle the matter, Congress added the word "terminate" to the phrase "alter, amend, or revoke" by Section 805 of the Revenue Act of 1936, c. 690, 49 Stat. 1648. The legislative history of that Section shows quite plainly that the addition of the word "terminate" was not considered as constituting a substantive change in meaning, but was rather deemed to be declaratory of existing law. Thus, the House Committee on

[11] The phrase "alter, amend, or revoke" in Section 811 (d) (2) relates to "any interest" whose enjoyment is subject to change, we submit, and not to the instrument of "transfer", as the court below apparently concluded (R. 41, 42).

Ways and Means (H. Rep. No. 2818, 74th Cong., 2d Sess., p. 10) stated: [12]

> Another change made in subsection (a) of section 206 has been to expressly include a power to terminate along with the powers to alter, amend, or revoke. In the case of *White* v. *Poor, supra,* the Supreme Court did not pass on the question of whether the power to terminate was included in the language relating to a power "to alter, amend or revoke." Since in substance a power to terminate is the equivalent of a power to revoke, this question should be set at rest. Express provision to that effect has been made and it is believed that it is declaratory of existing law.

The Committee Report is cogent evidence of the meaning of the statute prior to its amend-

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[12] This report was issued in connection with H. R. 12793, 74th Cong., 2d Sess., Section 206 of which contained the amendment here under consideration. While H. R. 12793 was not enacted, the provisions of Section 206, with changes not here material, became Section 805 of the Revenue Act of 1936.

Other changes made by the amendment related to the question decided in *White* v. *Poor, supra*, namely, whether the source of the decedent's power was a controlling consideration. Language was added to the effect that it was not material from what source the power was obtained or in what capacity it was exercisable by the decedent. The House Committee was not certain to what extent this was declaratory of existing law (H. Rep. No. 2818, *supra*, p. 9) and, accordingly, Section 805, as enacted, provided that the amendment should not apply to a transfer made before the adoption of the amendment (June 22, 1936), unless the transfer was taxable under the section prior to that time.

ment. See *Merrill* v. *Fahs*, 324 U. S. 308, 312–313; *Hartley* v. *Commissioner*, 295 U. S. 216, 220–221.

The administrative interpretation of the legislation shows a similar construction of Congressional intent. Section 81.20, Treasury Regulations 105 (Appendix, *infra*, pp. 43–45), provides in part:

> The third change made in the subdivision by the Revenue Act of 1936 (which is also embodied in subsection (d) (1) of section 811 of the Internal Revenue Code) consists of the addition of the words "or terminate" following the words "to alter, amend, revoke." Such addition is considered but declaratory of the meaning of the subdivision prior to the amendment. A power to terminate capable of being so exercised as to revest in the decedent the ownership of the transferred property or an interest therein, or as otherwise to inure to his benefit or the benefit of his estate, is, to that extent, the equivalent of a power to "revoke," *and when otherwise so exercisable as to effect a change in the enjoyment, is the equivalent of a power to "alter."* (Italics supplied.)

The court below, however, construed the word "terminate" as being used in a "restricted sense only" and as being equivalent in meaning to "revoke," thereby concluding that the transfer is to be taxed only when termination results in a return of the property to the decedent (R. 42).

The court believed that this interpretation was the one adopted by the Treasury Department and that the Treasury Regulations showed that "the word [terminate] was used in this restricted sense only." (R. 42.)[13] The opinion, however (R. 42), inadvertently omitted from the quotation of the Regulations the final portion set forth above in italics which supports the Commissioner's position in this case in all respects. Since the decedent's power to terminate was "so exercisable as to effect a change in the enjoyment" of the

[13] It would seem that, since the contingent interests would be extinguished if the decedent had made absolute gifts of the corpus to his sons, they were just as much subject to revocation as would have been true had they been subject to the same extinction upon a recapture of the property by the grantor. While the Committee Report and the Treasury Regulations use the word "revoke" as meaning a return of the property to the grantor, both may be regarded as illustrative and as not excluding a destruction of interests which does not result in the return of the property to the grantor.

While the language from *Porter* v. *Commissioner*, 288 U. S. 436, 443, referred to by the court below (R. 43) would tend to support the theory that the word "revoke" includes only a revocation of the transfer in favor of the grantor, we believe that the actual decision there does not preclude a holding that "revoke" also includes the destruction or extinction of some beneficial interests in favor of others. That was the manner in which "revoke" was used in *Commissioner* v. *Hofheimer's Estate* (*infra*, p. 32), and in *Mellon* v. *Driscoll* (*infra*, p. 33), where it was concluded that "revoke" had no relationship to the manner in which the corpus would be distributable. At all events, the point seems academic since the words "alter" and "amend" are sufficiently broad to include all changes of this nature, and the *Porter* case so holds.

interests which he created, it "is the equivalent of a power to 'alter'" and the transfer is required to be included in the decedent's gross estate.

While the court below correctly concluded that the meaning of the statute was not changed when the word "terminate" was added by the 1936 Act, the erroneous construction adopted has particularly far reaching consequences because, as interpreted, it excludes from taxation transfers of this nature made after June 22, 1936 (governed by Section 811 (d) (1) of the Internal Revenue Code). It would be strange if Congress had intended that taxation should depend upon the nomenclature employed in the instrument, or upon the method by which alteration or amendment of beneficial interests is achieved. This is particularly true of the estate tax where the admonition has often been repeated that taxation of a transfer does not depend upon "elusive and subtle casuistries" and that "the technical forms in which interests contingent upon death are cast" do not control. *Helvering* v. *Hallock,* 309 U. S. 106, 116–117, 118. It is more reasonable to believe, as the court concluded in the *Hofheimer* case, 149 F. 2d 733, 737:

> It would be strange, to say the least, if the settlor could reserve the same power by choosing to use the word "terminate" instead of "revoke" and by so doing accom-

plish what the statute was designed to prevent.[14]

As has been noted, the result reached below and the construction of the statute adopted are at variance with the view taken by the Circuit Courts of Appeals for both the Second and Third Circuits. In the *Hofheimer* case, *supra*, two brothers created a trust, each contributing one-half of the corpus; the income was payable to a cousin for life and after her death, the corpus was to be divided into two equal shares and was to be distributed to the living children of each settlor, and if not living, to their issue per stirpes. The decedent and his brother reserved the right to change the provisions with respect to the payment of income to the life tenant and they also retained the authority to terminate the trust at any time, thereby giving the corpus to the remaindermen. The Tax Court had ruled that the remainder interests were not includible in the decedent's estate because he could only have accelerated them and because termination in this manner was not included in the statute.[15] The Circuit Court of Appeals for the Second Circuit reversed,[16] stating (p. 736):

---

[14] Compare note 13, *supra*, p. 28.

[15] The Tax Court's holding in the *Hofheimer* case is similar to its holding in the present case that the decedent here only reserved the right to accelerate the time of enjoyment of the beneficial interest already given. See note 10, *supra*, p. 22.

[16] In the *Hofheimer* case, the Tax Court decided that the value of the interest of the income beneficiary was includible

Here the power to terminate was equivalent to the power to revoke as to the life estate and to bring about immediate distribution of the corpus to persons who otherwise might not take any of it at all. The enjoyment of the remainder interests which had been transferred in trust was therefore subject to change through the exercise of decedent's power of termination which was cut off by his death. If this power to change the enjoyment is not merely as to trivial matters it is within the statute. *Dort* v. *Helvering,* 63 App. D. C. 98, 69 F. 2d 836. It did not have to be exercisable by the settlor for his own benefit. *Porter* v. *Commissioner, supra.* The power at any time to change the enjoyment of the remainder interests from an indefinite period in the future by remaindermen whose identity and number were not presently known to the immediate present by individuals who were known cannot be regarded as but trivial. The test is not

---

in the decedent's gross estate, 2 T. C. 773. The Circuit Court of Appeals held that the remainder interest was to be included as well, thus causing the entire value of the transfer, as of the date of the decedent's death, to be taxed. In the present case, too, if the Commissioner's position is correct, Section 811 (d) (2) requires that the value of his entire transfer be included in the decedent's gross estate. Since the income from the trust could be withheld, or could still become payable to the various contingent beneficiaries, and since those interests survive because death released the decedent's ability to extinguish those interests, the value of the interests in the income of the trust as well as the value of the remainder interests in the corpus are to be included.

> whether the change has to be brought about by an acceleration of the falling in date of remainders or in some other particular way but whether the power reserved may be exercised to shift comparatively substantial economic benefits.

The fact that the decedent here retained the same economic power to give ownership to his children or to other beneficiaries who would be known to him at the date of termination, rather than to permit ownership to pass under the trust to beneficiaries who might not be known, has already been pointed out (*supra*, pp. 11–17) and need not be further discussed.

In the *Hofheimer* case, too, the addition of the word "terminate" by the 1936 Act was considered merely declaratory of existing law. As opposed to the decision below, however, the court there did not interpret the statute as precluding taxability where termination would not cause a revesting of the property in the grantor. On the contrary, in the *Hofheimer* case, the court found the words of the statute and the Treasury Regulations sufficient to embrace a termination which would, as here, result in the granting of ownership to known beneficiaries and would foreclose the passage of the property under the trust to persons whose identity was not ascertainable.

The decision below may also be contrasted with that in *Mellon* v. *Driscoll*, 117 F. 2d 477 (C. C. A. 3rd), certiorari denied, 313 U. S. 579, in which

the decedent's two children were given the income from the trust for life as well as the power to appoint the corpus by will. The settlor reserved the power, which he never exercised, to "revoke" the trust, whereupon the principal was to be distributed to the two beneficiaries and the trust was to come to an end. The taxpayer there argued that the decedent had merely reserved the power to "terminate" and, as such, that it was not included in the statute prior to the 1936 amendment. The court rejected this contention, stating (p. 480):

> It is clear that revocation is but a method of bringing a trust to an untimely end and has no relation to the consequent and subsequent fate of its corpus. The "calling back" is of time rather than of space. It seems unnecessary to be troubled by the Treasury's doubts as to the kind of termination or to resort to their ascription of the word itself to "alter" rather than to "revoke".

Referring to the changes in enjoyment which bring the statute into operation, the court said (pp. 478–479):

> We think this inclusion proper and are surprised at its being questioned. The theory of the tax is both old and familiar. The settlor's death, or in the case of the gift tax, his release, ends his power and so passes a valuable assurance of title. The statute has been given a liberal interpreta-

> tion and taxability thereunder found in many different sets of circumstances. A shifting of economic benefits has been stressed. The grantor need not be able to exercise the power for his own benefit and in fact may expressly exclude any alteration in favor of himself. A change of beneficiaries or a change in the amounts they are to take is sufficient. The statute applies even though parties with adverse interests share the power with the settlor. In fact the only qualifications permitted go to a power affecting trivial and unimportant matters and to the retroactive application of the statute if the power is exercisable by the grantor in conjunction with another person.

It seems fairly evident that the changes in enjoyment which the decedent in *Mellon* v. *Driscoll, supra,* could have brought about were far less sweeping than those that the decedent could have achieved in this case. The court below, however, stated that if *Mellon* v. *Driscoll,* were not distinguishable, it should not be followed.[17]

We submit that the obvious loophole in the legislation which results from the decision below was never intended by Congress and that the interpretation of the statute in the *Hofheimer* and

[17] The Tax Court thought that *Mellon* v. *Driscoll* was distinguishable on the ground that there the donor would have recaptured the property and would have made a new gift of it to his children. (R. 16–18.) The Tax Court's analysis of *Mellon* v. *Driscoll* seems patently untenable.

Mellon cases is more closely in accord with the Congressional purpose of taxing transfers whenever the grantor is enabled, by any means, to alter, amend or revoke the interests which he has created, thereby causing a change in their enjoyment.[18]

Estate of Sanford v. *Commissioner,* 308 U. S. 39, relied on in the opinion below for the conclusion that the Commissioner's position goes beyond the scope of the statute, does not support that reasoning. The *Sanford* case involved the gift tax and merely held that even though the donor could not revoke the trust in his own favor, the gift was incomplete so long as he had the power to choose new beneficiaries, and that the gift became effectuated when the donor relinquished his authority of selection. The portion of the *Sanford* opinion quoted below (R. 41) does not, as the lower court seemed to think, imply that the type of transfer involved in this and similar cases would be considered as complete when the trust was established and, consequently, taxable as a gift at that time.[19] Since this Court, in the quoted excerpt from the *Sanford* opinion, was referring to the type of transfers which it had already ruled to be incomplete until the grantor's re-

[18] H. Rep. No. 179, 68th Cong., 1st Sess., p. 35 (1939–1 Cum. Bull. (Part 2) 241, 261); S. Rep. No. 398, 68th Cong., 1st Sess., pp. 34–35 (1939–1 Cum. Bull. (Part 2) 266, 290).

[19] The record does not disclose that a gift tax was paid when the trust was established in this case.

served power was extinguished at death, and since a transfer of the precise nature involved in this case has not been considered by this Court, the opinion has no significant application here.

The taxpayer contends, however (in the brief in opposition to the petition for certiorari (pp. 5–6), and the Tax Court so concluded (R. 19), that the transfer was so complete as to be taxable as a gift when the trust was created and that there would have been no taxable gift if the decedent, during his lifetime, had relinquished his retained power. In support of that contention, the following from Section 86.3, Treasury Regulations 108, promulgated under the gift tax provisions of the Internal Revenue Code, has been urged as showing that the gift tax would be imposed only when the trust was created:

> A gift shall not be considered incomplete, however, merely because the donor reserves the power to change the manner or time of enjoyment thereof. Thus, the creation of a trust the income of which is to be paid annually to the donee for a period of years, the corpus being distributable to him at the end of the period, and the power reserved by the donor being limited to a right to require that, instead of the income being so payable, it should be accumulated and distributed with the corpus to such donee at the termination of the period, constitutes a completed gift.

The above language, however, clearly does not describe the interests created here and the contrary conclusion of the Tax Court undoubtedly stems from its erroneous assumption that, in making the gift, the decedent had merely reserved the power "to accelerate the time of its enjoyment." (R. 18; see *supra*, note 10, p. 22, note 5, p. 17, and note 15, p. 30.) Actually, Section 86.3, of Treasury Regulations 108, provides that the transfer here was not complete when made; it states:

> As to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to change the disposition thereof, whether for his own benefit or for the benefit of another, the gift is complete. But if upon a transfer of property (whether in trust or otherwise) the donor reserves any power over the disposition thereof, the gift may be wholly incomplete, or may be partially complete and partially incomplete, depending upon all the facts in the particular case. According, in every case of a transfer of property subject to a reserved power, the terms of the power must be examined and its scope determined.
>
> A gift is incomplete in every instance where a donor reserves the power to revest the beneficial title to the property in himself. ***A gift is also incomplete where and to the extent that a reserved power gives the donor the right to name new***

> *beneficiaries or to change the interests of the beneficiaries as between themselves.* * * * [Italics supplied.]

We think it clear that a gift tax would not properly be imposed when the trust was established. The lack of complete integration between the gift and estate taxes has, however, been noted. *Estate of Sanford* v. *Commissioner*, 308 U. S. 309; *Smith* v. *Shaughnessy*, 318 U. S. 176. In the last cited case it was held that the gift tax may be imposed on an *inter vivos* transfer even though the property might also be considered includible in the grantor's gross estate, the court stating (p. 179):

> It is sufficient to note here that Congress plainly pointed out that "some" of the "total gifts subject to gift taxes * * * may be included for estate tax purposes and some not." House Report No. 708, 72d Cong., 1st Sess., p. 45. Under the statute the gift tax amounts in some instances to a security, a form of down-payment on the estate tax which secures the eventual payment of the latter; it is in no sense double taxation as the taxpayer suggests.

C. *The decedent's power to terminate was exercisable by him as grantor, but, in any event, the capacity in which it was exercisable is immaterial.*—Another contention made by the taxpayer below, but not passed on by the Circuit Court of Appeals, was that the reserved control was

exercisable by the decedent in his capacity as trustee, and that the statute was not applicable on that account.

We believe that the trust instrument reserved to the decedent the power of termination in his capacity as grantor, and not as trustee. The second sentence of Paragraph Eleventh (R. 36) provides that the "Grantor may, during his lifetime," terminate the trust "if deemed advisable by him", and that his son or sons "while acting as Trustee" "may, if deemed advisable by them as Trustee" terminate the trust. We believe that this reveals an intention to give the power of termination to the decedent in his capacity as grantor and was intended to distinguish between the nature of his discretionary authority to terminate the trust as an individual, and the nature of the discretionary power of his sons to terminate the trust in their capacity as fiduciaries. Moreover, comparison of the specific references to the "Grantor" and to the "Trustee" in Paragraph Eleventh, with the general use of the term "Trustee" in the trust instrument to apply to the decedent as well as his successor trustees, is persuasive evidence that the decedent intended to retain, in his capacity as an individual, the authority to terminate the trust.

But even if the trust instrument could be construed in the manner contended for by the taxpayer, the capacity in which the decedent might exercise his control is not a material considera-

tion. The parenthetical phrase "(in whatever capacity exercisable)" was added to Section 302 (d) of the Revenue Act of 1926 by Section 805 of the Revenue Act of 1936. While the legislative history is silent on that question,[20] the amendment has been held to be declaratory of existing law. *Welch* v. *Terhune,* 126 F. 2d 695 (C. C. A. 1st), certiorari denied, 317 U. S. 644; *Union Trust Co. of Pittsburgh* v. *Driscoll,* 138 F. 2d 152 (C. C. A. 3d), certiorari denied, 321 U. S. 764. See Section 81.20, Treasury Regulations 105. The Tax Court has also held that the capacity in which the power is exercisable by the decedent is not material (*Estate of Nettleton* v. *Commissioner,* 4 T. C. 987), and it so conceded in the present case (R. 18). In *Welch* v. *Terhune, supra,* the court said (p. 697):

> Nor does it matter that the trust instrument vested the power in Terhune in his capacity as a trustee named in the instrument rather than in his capacity as grantor. As previously noted, § 302 (d) refers to the existence of the power in the decedent, not to the capacity in which it is to be exercised. So far as we can see, nothing turns

[20] See *supra*, note 12, p. 26. As has been observed, *supra*, p. 25, the decision in *White* v. *Poor*, *supra*, did not rest on the fact that the decedent's control was exercisable in her capacity as trustee, but rather on the fact that her control emanated from her appointment as a trustee by the other trustees and the beneficiaries and that it did not come from any power which she had reserved for herself in the original instrument.

on whether the power now in question is to be described as a fiduciary or non-fiduciary power. It is enough that the grantor had retained in his hands a power, whether alone or in conjunction with others, to vary materially the enjoyment of the numerous property interests.

If, as we contend, the transfer from the decedent was incomplete when made and would become final only when the decedent's control was relinquished, then it seems fairly plain that the capacity in which that control was exercisable by him ought not to govern the imposition of the estate tax. The enjoyment of the interests created was subject to the same degree of change, and the decedent's death gave the same assurance that he could no longer cause any change, regardless of whether his previous authority was that of an individual or that of a fiduciary.

CONCLUSION

The decision of the Circuit Court of Appeals is erroneous and should be reversed.

Respectfully submitted,

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NOVEMBER 1945.

APPENDIX

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

(d) *Revocable transfers.*—(1) *Transfers after June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona-fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death;

(2) *Transfers on or prior to June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to

alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a transfer shall be included in the gross estate under paragraph (1) unless it is includible under this paragraph (26 U. S. C. 811).

* * * * *

Treasury Regulations 105, promulgated under the estate tax provisions of the Internal Revenue Code:

SEC. 81.15. *Transfers during life.*—The following classes of transfers made by the decedent prior to his death, whether in trust or otherwise, if not constituting bona fide sales for an adequate and full consideration in money or money's worth, are subject to the tax: * * * (5) transfers under which the enjoyment of the transferred property was subject at decedent's death to a change through the exercise, either by the decedent alone or in conjunction with another person or persons, of a power to alter, amend, revoke, or terminate, or where such a power was relinquished in contemplation of decedent's death (see sections 81.20 and 81.21).

* * * * *

SEC. 81.20. *Transfers with power to change the enjoyment.*—(a) *Transfers included.*—Subsection (d) of section 811 embraces a transfer by trust or otherwise (if not amounting to a bona fide sale for an adequate and full consideration in money or money's worth) when at the time of de-

cedent's death the enjoyment of the transferred property, or some part thereof or interest therein, was subject to any change through a power exercisable either by the decedent alone, or by him in conjunction with some other person or persons, to alter, or amend, or revoke, or terminate. (See section 81.15.)

The addition to subdivision (d) (1) of the Revenue Act of 1926, by section 805 of the Revenue Act of 1936, of the phrase to the effect that it is not material in what capacity the power was subject to exercise by the decedent or by the other person or persons in conjunction with the decedent (which phrase is also embodied in subsection (d) (1) of section 811 of the Internal Revenue Code), is considered merely declaratory of the meaning of the subdivision prior to the addition of the phrase.

The second phrase added to this subdivision of the Revenue Act of 1926 by amendment in 1936 (also embodied in section 811 (d) (1) of the Internal Revenue Code), namely, "without regard to when or from what source the decedent acquired such power," is not considered declaratory of the meaning of the subdivision prior to the amendment in a case in which no one of the powers enumerated in the subdivision was reserved at the time of the making of the transfer, but one or more thereof were conferred subsequent thereto (whatever the source from which conferred) without any understanding, expressed or implied, had in connection with the making of the transfer that such power or powers should be later conferred.

The third change made in the subdivision by the Revenue Act of 1936 (which is also

embodied in subsection (d) (1) of section 811 of the Internal Revenue Code) consists of the addition of the words "or terminate" following the words "to alter, amend, revoke." Such addition is considered but declaratory of the meaning of the subdivision prior to the amendment. A power to terminate capable of being so exercised as to revest in the decedent the ownership of the transferred property or an interest therein, or as otherwise to inure to his benefit or the benefit of his estate, is, to that extent, the equivalent of a power to "revoke," and when otherwise so exercisable as to effect a change in the enjoyment, is the equivalent of a power to "alter."

U. S. GOVERNMENT PRINTING OFFICE: 1949

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 203

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ESTATE OF HARRY HOLMES, DECEASED, LUCY B. HOLMES,
INDEPENDENT EXECUTRIX
Respondent

REPLY TO PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Fifth Circuit

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To the United States Circuit Court of Appeals for the Fifth Circuit

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Lucy B. Holmes, Independent Executrix, on behalf of the Estate of Harry Holmes, Deceased, prays the Court to deny the Petition for Writ of Certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, filed herein by the Solicitor General, on behalf of the Commissioner of Internal Revenue.

Opinions Below

The opinion of The Tax Court (R. 18-31) is reported at 3 T. C. 571. The opinion of the Circuit Court of Appeals (R. 65-69) has not yet been reported.

Statement

The Statement of Facts in the application is substantially correct, and may be summarized as follows:

Harry Holmes, on January 20, 1935, executed the Trust instrument naming himself as Trustee (with successors) and setting up three separate trusts for his three sons, Harry Holmes, Jr., John B. Holmes, and Thomas J. Holmes. Under each trust the trustee was directed to use the income therefrom for the respective beneficiary for fifteen years at which time such beneficiary should receive the corpus.

If any son died before the termination of the trust, leaving issue, such issue would receive the income until he reached the age of twenty-one years, when he would receive the corpus.

If any son died before termination of the trust, without issue or leaving issue who died before reaching the age of 21, such trust should enure to the beneficiaries of the other two trusts.

The Trustee or his Successor Trustee had the power to terminate any or all of the trusts prior to the end of the fifteen-year period and deliver the entire trust corpus to the beneficiaries then entitled to receive it.

Question to Be Determined

The Commissioner claims that this power of termination was the equivalent of a power to "alter, amend or revoke" so as to make the enjoyment of the trust subject to change

within the meaning of Sec. 811(d)(2) of the INTERNAL REVENUE CODE, and the trust property, therefore, includible in the grantor's estate.

The Tax Court held otherwise and was sustained by the Circuit Court of Appeals for the Fifth Circuit—holding that the power of termination under the facts and provisions of the trust instrument could only result in an acceleration of the time of enjoyment by the beneficiaries then entitled to receive the corpus under the terms of the original instrument and that the power of termination was, therefore, not the equivalent of a power to alter, amend or revoke.

Reasons for Denying the Petition

I.

Petitioner states as his first reason for granting the Writ that the decision below is in conflict with MELLON v. DRISCOLL, 117 F. (2d) 477 (C.C.A. 3), certiorari denied, 313 U.S. 579, and with COMMISSIONER v. HOFHEIMER (C. C. A. 2), decided May 25th, 1945, and not yet reported. (#72561—PRENTICE HALL FEDERAL TAX SERVICE, VOL. 5—Current Court Decisions.)

Respondent denies that there is any conflict between the decisions below and either MELLON v. DRISCOLL, or COMMISSIONER v. HOFHEIMER. The MELLON case was clearly distinguished by The Tax Court and petitioner does not discuss or even point out the alleged lack of "validity or significance" in the distinction. Petitioner has, in fact, failed to indicate how the facts were similar, or how the decisions differ as to applying the law.

The HOFHEIMER case was not decided for more than a month after the HOLMES case was decided, and therefore, could not have been discussed or considered by the court

below; also, the court in the HOFHEIMER case took no exception to the decisions in the HOLMES case.

We observe, however, that the MELLON case was one in which the Circuit Court found that a reserved right to "revoke" a particular trust was a right of revocation within the meaning of Sec. 811(d)(2). Petitioner does not even contend that the power of the trustee to terminate the trust in the instant case was the equivalent of a right of revocation.

The disinction of the facts in the HOLMES case from the MELLON case was so obvious and indisputable that the Circuit Court of Appeals merely approved the distinction as found by The Tax Court without repeating it. That the court below declined to follow a case decided upon admittedly different facts, is no evidence of a conflict, and certainly would not justify this Court in granting a WRIT of Certiorari.

In the MELLON case death changed the economic status of the beneficiaries so they were forever barred from participating in the corpus of the trust; before death, Mellon, Trustor, had the reserved right to "revoke the trust and distribute the corpus to the two beneficiaries." By his death they lost all chance to ever share in the corpus. The language of Mellon's trusts, which were involved in the case was as follows:

> "The Party of the first part hereby reserves the right, after six months written notice of his intention so to do, served on the party of the second part, to *revoke* this trust, whereupon the principal of the trust fund should be distributed to Thomas Mellon and Lucille Mellon Grange, and the trusts shall end." (Italics ours.)

Such distribution would have required, "a new conveyance of the corpus to the beneficiaries." (Tax Court Decision, R. 28.)

RANDOLPH PAUL, FEDERAL ESTATE AND GIFT TAXATION, Volume 1, page 385, Sec. 7.09, refers to MELLON v. DRISCOLL, stating:

> "and it has been held that power to revoke, which would change the beneficiaries' interests from life estates to absolute ownership, makes the grantor's estate taxable."

The court in the MELLON case correctly held, "a change in beneficiaries (citing cases) or a change in the amounts they are to take (citing cases) is sufficient."

In the HOLMES case, the original instrument irrevocably conveyed the corpus, subject to a fifteen-year trust. Neither the Trustee nor anyone else, could alter or revoke either—(1) the fifteen-year trust, (2) the conveyance of the corpus, or (3) change the amount any beneficiary was to take. Death alone of one or more beneficiaries without issue and within the fifteen-year term could effect a change in the amounts a beneficiary would take. Holmes, as Trustee, by the exercise of the power to terminate the fifteen-year trust, could only advance the time in which the beneficiaries then entitled to same, would receive the corpus in the exact shares as irrevocably conveyed in the Trust Instrument. This right in the Trustee to *terminate* the Holmes trust passed by the terms of the instrument, at his death, to the Successor Trustee, and Holmes' death made no change of any kind or character in the economic status of the beneficiaries or of Holmes' estate. The Successor Trustee stepped into Holmes Trustee's shoes with every right he had as Trustee prior to his death. There is here no power to change the beneficiaries or to change the amounts they are to take, but only a right to accelerate the time of the enjoyment.

TREASURY REGULATIONS 108, Section 86.3.—*Cessation of Donor's Dominion and Control*, reads:

> "*A gift shall not be considered incomplete, however, merely because the donor reserved the power to change the manner or time of the enjoyment thereof.* Thus, the creation of a trust the income of which is to be paid annually to the donee for a period of years, the corpus being distributable to him at the end of the period, and the power reserved by the donor being limited to a right to require that, instead of the income being so payable, it should be accumulated and distributed with the corpus to such donee at the termination of the period, constitutes a completed gift."

The courts rightly consider the close relationship between the gift tax law and the estate tax law (SANFORDS ESTATE v. COMMISSIONER, 308 U.S. 39) and as The Tax Court said in this case:

> "If there would have been no imposition of the gift tax on his voluntary surrender of the right to terminate because there would have been no sufficient transfer of property to justify the tax, it is difficult to see how an estate tax would be imposed upon his involuntary cessation of such right by death. For reasons we have already stated, we think there was none" (R. 30).

The HOFHEIMER case is even more easily distinguishable on the facts. In that case the life tenant as first taker was a different person than the remaindermen, and the power of termination reserved to the Trustee-grantor would have the effect of *revoking* the life estate and vesting fee title in the remaindermen free from the life estate—certainly not only a revocation but clearly an *alteration*. Here was even more of an alteration than in the MELLON case.

Respondent believes a lack of conflict between the HOLMES case and the MELLON and HOFHEIMER cases must be admitted. Wherefore, Petitioner's First Point states no ground for granting the Writ.

II.

Petitioner's second reason for granting the Writ is a contention that the decision below was erroneous because the power of termination reserved to the Trustee (although not a power of revocation as in the MELLON case) was, nevertheless, the equivalent of a power which might have "altered or amended the transfer made and the interests thereunder" (Petitioner's Brief, p. 9, Par. 2).

Respondent disagrees completely with Petitioner's construction of the trust in his Argument on this point. Respondent's contention is, the instrument gave each of the beneficiaries a vested present estate which could not thereafter be altered, amended or revoked by either the Trustee or by any other earthly power, and that the right of the Trustee or Successor Trustee to terminate, could only effect an acceleration of the time of enjoyment of the trust corpus.

Petitioner's Argument is based on a false premise that Holmes' death, without exercising the power of termination brought about a change in economic status of the beneficiaries, or on the other hand, if Holmes' Trustee had exercised the power of termination, the result of that act would have brought about a change in the economic status of the beneficiaries; but the fact is, each of these remote, contingent, or putative beneficial interests on which the petition is based, were not in the slightest particular changed or affected by Holmes' death; *but each contingent, putative or other right Petitioner mentions, depends entirely on the death; not of Holmes, but on the death of one or more of the three beneficiaries, without issue and before fifteen years from the date of the trust.* This statement is true whether or not Holmes, Trustee, or the Successor Trustee, does or does not exercise the power of termination.

As The Tax Court said and the Circuit Court affirmed:

> "As we have already pointed out, the trust indenture here involved reserves the right to the grantor neither as an individual nor as a trustee to alter or amend the trust. He only had the right to terminate it and thereby accelerate the time that the beneficiaries might enjoy the corpus of the trust which had already been irrevocably given to them in the trust indenture" (R. 31).

Death always terminates any decedent's continued enjoyment of his property rights. Death of any of the beneficiaries of this trust prior to termination, without issue and within fifteen years, would cause the remainder to pass to other beneficiaries of the trust rather than to the heirs of the deceased beneficiary; but this was provided in the trusts instrument. This was the Trust and Holmes Trustee's right of termination, his termination, or his death without exercising the power, could in no way affect, change, or alter any beneficiary's right or property.

Any change in the economic status could result only from the death, without issue and prior to fifteen years after creation of the Trusts, of a *beneficiary* of the trust—the death of the grantor-trustee would have no bearing on it one way or the other. In other words, the beneficiaries had contingent remainders in the shares of other beneficiaries, if they died without issue and within fifteen years. But these contingent interests were created by the *original trust instrument*—they could not be altered, changed, amended or revoked by the grantor-trustee, or anyone else; they were *vested*. Death alone of a beneficiary without issue and within the fifteen-year term, could divest it.

Petitioner cannot contend that the decision below is erroneous except by contending that the holding in the MELLON case (on facts clearly distinguished) should be extended to cover the various contingencies imaginable as a result of

the *death* of any beneficiaries without issue, between the time of the exercise of the power and the fifteen-year period. It is true that the death of a beneficiary without issue, after any exercise of the power and prior to fifteen years, would change the enjoyment of the trusts property from what it would have been had there been no such death without issue.

Neither the MELLON case nor the HOFHEIMER case were concerned with any such "resulting" change brought about, not by the exercise of the power itself, but by a subsequent, uncontrollable and unanticipated contingency. Therefore, the Petitioner's contention that the decision below was erroneous has no authority to support it and must depend completely upon analysis of the Statute and Regulations, as applied to the facts at hand.

The purpose of the Estate Tax Law is to tax *property interest* passing at death from the decedent to his heirs or appointees. Section 811(d) was designed to prevent a decedent from avoiding the Estate Tax by pretending to transfer his property in trust, while actually reserving to himself powers to alter, amend or revoke the trust.

The Tax Court held that the power reserved to the Trustee in the Holmes' Trust was neither within the wording nor the spirit of the Section.

We give attention first to the question of whether the power violated the spirit of the Act.

Petitioner does not contend either in the Application for the Writ, or in any of the Courts below, that a pure and simple "acceleration" of the time of enjoyment would come within the spirit of the Act and does not attack the holding of the court below on that basis. At any time, however, the Trustee could conceivably exercise the power of termination, the acceleration of the time of enjoyment to the beneficiaries *then* entitled to receive, is the only thought which could

enter the mind of the Trustee or motivate his decision to exercise the power. The Trustee could not at any time he exercised the power, anticipate the happening of any of the remote contingencies or putative rights here relied upon by the petitioner, and if any change in economic status should ultimately result from the death of a beneficiary, after the exercise of the power, such change could not be said to have been directed by any volition or exercise of will by the Trustee. For example, he could not know or anticipate, at the time of the exercise of the power, whether he was depriving the terminated beneficiary of rights of survivorship in the other trusts, or whether he was depriving the other beneficiaries of rights of survivorship in the terminated trust —because the Trustee could not anticipate which, if any, of the beneficiaries might *possibly* die without issue within the period of time between the exercise of the power and the expiration of fifteen years.

Since the Trustee, at the time of the exercise of the power, could have no "intent" to *change* the beneficiaries or their economic status (except to accelerate), the Trustee reserved no such control over the property interest theretofore transferred by him as grantor as was contemplated in this Section of the Act. In other words, the Grantor did not reserve to himself any power by which he could evade or defeat the purpose of the Estate Tax Law by pretending to transfer his property while reserving to himself the right to thereafter, during his lifetime, alter, amend or revoke the enjoyment of the property.

The power involved does not violate the spirit of the Act, and likewise does not come within the wording thereof. The Act applies:

> "where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke * * * ."

It must be conceded in this case that the exercise of the power *itself* could bring about no change of enjoyment of any kind except the acceleration of the time of enjoyment.

The Regulation which petitioner alleges to control in this case simply explains that the Act applies to a power of alteration or revocation regardless of the "name" applied to the power in the trust instrument. In the absence of a death of any primary beneficiary, which incidentally was not likely in view of the ages (19, 24 and 27 in 1940, see Record p. 5), there would be no change in enjoyment regardless of the exercise of the power. It cannot be said, therefore, that any change could result through the exercise of the power—no change could result at any time in the absence of subsequent unforseeable contingencies. Neither the Statute nor the Regulations pretend to extend to changes of enjoyment brought about by contingencies not under the control of the decedent whether such contingencies might occur prior to the exercise of the power or afterwards.

As an example of remoteness, these contingent and putative interests had *no value* recognizable by law, because the life expectancy of each beneficiary was far in excess of the fifteen-year trust and durations of the power.

It cannot, therefore, be said that the decision of The Tax Court was contrary either to the spirit or the letter of the Act or the Regulations. On the contrary, The Tax Court had a right to conclude as a question of fact, or to say the least, as a mixed question of fact and law, that the power reserved to the decedent was not one which the Act intended to penalize, and this having been affirmed by the Circuit Court of Appeals, it is submitted that such decision is binding upon the Supreme Court in the absence of clear contradiction either in the statute or prior decisions. (DOBSON v. COMMISSIONER, 320 U.S. 489, 64 S. Ct. 239.)

III.

In his third reason for urging the granting of the Writ, petitioner argues that Section 81.20 of Treasury Regulations 105 is decisive of the case. If Congress intended Subsection (1) of Sec. 811(d) as merely *declaratory* of prior existing law, it is strange that Congress expressly made such section applicable only to transfers "after June 22, 1936" and that Congress re-enacted Subsection (2) without the word "terminate" and expressly made it apply to transfers "on or prior to June 22, 1936." Respondent does not quarrel particularly with the Regulation itself. It is true that it uses rather broad language in stating that the word "terminate" adds nothing to existing law prior to the amendment, but this broad statement is immediately thereafter, limited by the regulation itself to powers of termination "capable of being so exercised as to be the equivalent of a power to 'revoke' * * * (or) 'alter'."

It is not questioned that any power to revoke or alter (by whatever name it might be called) was covered by the old act; also, petitioner's interpretation of Regulation 105, Sec. 81.20 cannot be reconciled with Regulation 108, Sec. 86.3, referring to Completed Gifts, and herein quoted and discussed at pages 5-6 of this Brief. According to the interpretation of both regulations by The Tax Court in this case there is no conflict between them. Respondent believes the interpretation of these regulations which makes for harmony, should be followed.

Whereupon, Petitioner's Third Point states no ground for granting the writ.

IV.

Petitioner does not discuss his Fourth reason, and respondent will not discuss it at length. There is here no conflict with either of the two cases cited. (Petitioner's Brief, p. 12) PORTER v. COMMISSIONER, 288 U.S. 436; MILLARD v. MA-

LONEY, 121 F. (2d) 257 (C.C.A. 3), certiorari denied, 314 U.S. 636.

In each of those cases the Grantor reserved in himself a clear-cut power to change beneficiaries or alter the amounts they were to receive; and the MILLARD case simply followed the Supreme Court in the PORTER case in holding that the reservation of such power was directly within the wording of the Act, even though the Grantor could not use the power to benefit himself or his estate. In an entirely different fact situation the court below did not bring itself in conflict with either of those decisions by observing that the power of termination as provided in the Holmes Trust was not such as to constitute the equivalent of a power to revoke the trust and place the title or any economic interest back in the grantor or his estate.

This reasoning by the Circuit Court of Appeals was only used in distinguishing the facts in this case from those in the MELLON case, where Mellon-Grantor had reserved in himself the power to "revoke."

V.

The fifth reason given by the Petitioner for the granting of the Writ is that the reasoning of the Fifth Circuit Court in this case might be considered as precedent in the construction of Section 811 (d) (1) of the INTERNAL REVENUE CODE in construing "transfers made after June 22, 1936." This section specifically applied only to transfers made after June 22, 1936, and was not either applied or considered in the decision below which was concerned exclusively with Subsection (2) of Section 811 (d), which by its own terms, only covered transfers made prior to that date.

The Tax Court expressly eliminated such probability by stating (R. 29):

"But in transfers made on or prior to June 22, 1936, where the settlor has retained only a power to terminate the trust and has retained no power to revest in himself or in his estate any part of the trust corpus or to change or alter the disposition of the trust corpus already given to the beneficiaries under the terms of the trust indenture but only to accelerate the time of its enjoyment, we do not think the value of the trust corpus is includable under Section 811(d)(2), Internal Revenue Code, or any other provision of the Internal Revenue Code. *As to whether such transfers with such a power to 'terminate' as we have here made after June 22, 1936, would be includable in a decedent's estate under Section 81(d)(1), Internal Revenue Code, we express no opinion. We do not have that state of facts before us.*" (Italics ours.)

Certainly, this point is moot in the instant case, and is not a reason which this Court may properly consider in deciding whether to grant or deny the Writ.

Conclusion

1. It is submitted that the decision below was not in conflict with the decisions in either MELLON v. DRISCOLL, supra, or COMMISSIONER v. HOFHEIMER, supra, the facts being materially different and the facts in the latter two cases being directly within the wording and the meaning of the Act.

2. It is further submitted that the decision below was not erroneous for the following reasons:

(a) That part of the Act which applied to transfers prior to June 22nd, 1936, did not cover powers of "termination."

(b) The power of "termination" reserved in this case

could not be exercised in such a manner as to be the equivalent of a power to alter, amend or revoke within the meaning of the Act or Treasury Regulations, *because*

no change in economic benefits could possibly occur at the time of the exercise of the power as a result thereof;

any subsequent change in enjoyment could result only from the death of a beneficiary without surviving issue before the expiration of the fifteen-year period;

any change of economic status due to the death of a beneficiary without surviving issue and within fifteen years, would be wholly unconnected with and unaffected by the exercise of the power by Holmes, Trustee (or successor Trustee); and the death or the effect thereof would be entirely beyond his anticipation at the time of the exercise of the power and beyond his control;

any such change in enjoyment due to death of a beneficiary without surviving issue, would be so remote, uncontrollable and unforeseeable that it could not be said to be the result of any intent, volition or exercise of will by the grantor-trustee.

the contingent and putative interests upon which petitioner relies completely can have *no value* recognizable by law, since the life expectancy of each beneficiary exceeded the duration of the power;

(c) The existing authorities and Treasury Regulation with reference to the imposition of gift taxes support the conclusion of the court below that the mere acceleration of the time of enjoyment does not constitute a passing of property interest and is not such a change of enjoyment as was contemplated by the Act.

3. It is further submitted that the decision below is not contrary to Section 81.20 of Treasury Regulation 105 as the

meaning of the word "termination" is limited in the regulation itself to powers "capable of being so exercised as to be the equivalent of a power to 'revoke' * * * (or) 'alter';" and that the petitioner's contention that the word "terminate" used in the regulation should have been given an unlimited application involves an unreasonable and strained construction of the Regulation itself, brings the regulation in conflict with Section 86.3 of Treasury Regulations 108, and is in conflict with the obvious intent of the Act of Congress in omitting the word "terminate" from that part of the Act applying to transfers made "prior to June 22nd, 1936."

4. It is further submitted that the decision below was not in conflict with the decision of the Supreme Court in PORTER v. COMMISSIONER, supra, or with MILLARD v. MALONEY, supra, simply because the court below in determining that this power of termination was not the equivalent of a power of revocation, observed that upon exercise of the power in this case no title would revert to the Grantor.

5. It is further submitted that this Court should not take jurisdiction because of any possibility that the decision below might be cited as precedent in cases involving transfers made after June 22nd, 1936, because both the part of the Act applicable to the facts here, and the decisions in both courts below were expressly limited to transfers "made prior to June 22nd, 1936."

WHEREFORE, Respondent submits that the decisions of the Courts below were correct and are not in conflict with, but are in accord with the previous decisions of this Court, and of other Circuit Courts of Appeals; and Respondent prays

that the petition for Writ of Certiorari be in all things denied at Petitioner's cost.

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APPENDIX

Internal Revenue Code:

See. 811. Gross Estate.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * *

(d) *Revocable transfers*—(1) *Transfers after June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona-fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death;

(2) *Transfers on or prior to June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a transfer shall be included in the gross estate under Paragraph (1) unless it is includible under this paragraph;

(26 U. S. C., Sec. 811.)

* * *

Treasury Regulations 105, promulgated under the estate tax provisions of the Internal Revenue Code:

Sec. 81.15 *Tranfers during life.*—The following classes of transfers made by the decedent prior to his death, whether in trust or otherwise, if not constituting bona fide sales for an adequate and full consideration in money or money's worth, are subject to the tax: * * * (5) transfers under which the enjoyment of the transferred property was subject at decedent's death to a change through the exercise, either by the decedent alone or in conjunction with another person or persons, of a power to alter, amend, revoke, or terminate, or where such a power was relinquished in contemplation of decedent's death (see Sections 81.20 and 81.21).

* * *

Sec. 81.20. *Transfers With Power to Change the Enjoyment.*—(a) Transfers included.—Subsection (d) of Section 811 embraces a transfer by trust or otherwise (if not amounting to a bona fide sale for an adequate and full consideration in money or money's worth) when at the time of decedent's death the enjoyment of the transferred property, or some part thereof or interest therein, was subject to any change through a power exercisable either by the decedent alone, or by him in conjunction with some other person or persons, to alter, or amend, or revoke, or terminate. (See Section 81.15.)

The addition to Subdivision (d) (1) of the Revenue Act of 1926, by Section 805 of the Revenue Act of 1936, of the phrase to the effect that it is not material in what capacity the power was subject to exercise by the decedent or by the other person or persons in conjunction with the decedent (which phrase is also embodied in Subsection (d) (1) of Section 811 of the Internal Revenue Code), is considered merely declaratory of the meaning of the subdivision prior to the addition of the phrase.

The second phrase added to this subdivision of the Revenue Act of 1926 by amendment in 1936 (also embodied in Section 811 (d) (1) of the Internal Revenue Code), namely, "without regard to when or from what source the decedent

acquired such power," is not considered declaratory of the meaning of the subdivision prior to the amendment in a case in which no one of the powers enumerated in the subdivision was reserved at the time of the making of the transfer, but one or more thereof were conferred subsequent thereto (whatever the source from which conferred) without any understanding, expressed or implied, had in connection with the making of the transfer that such power or powers should be later conferred.

The third change made in the subdivision by the Revenue Act of 1936 (which is also embodied in Subsection (d) (1) of Section 811 of the Internal Revenue Code) consists of the addition of the words "or terminate" following the words "to alter, amend, revoke." Such addition is considered but declaratory of the meaning of the subdivision prior to the amendment. A power to terminate capable of being so exercised as to revest in the decedent the ownership of the transferred property or an interest therein or as otherwise to inure to his benefit or the benefit of his estate, is, to that extent, the equivalent of a power to "revoke," and when otherwise so exercisable as to effect a change in the enjoyment, is the equivalent of a power to "alter."

Treasury Regulations 108, promulgated under the gift tax provisions of the Internal Revenue Code:

Section 86.3. *Cessation of Donor's Dominion and Control.* —A gift shall not be considered incomplete, however, merely because the donor reserved the power to change the manner or time of enjoyment thereof. Thus, the creation of a trust the income of which is to be paid annually to the donee for a period of years, the corpus being distributable to him at the end of the period, and the power reserved by the donor being limited to a right to require that, instead of the income being so payable, it should be accumulated and distributed with the corpus to such donee at the termination of the period, constitutes a completed gift.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 203

COMMISSIONER OF INTERNAL REVENUE, *Petitioner*,

v.

ESTATE OF HARRY HOLMES, DECEASED, LUCY B. HOLMES, INDEPENDENT EXECUTRIX, *Respondent*

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

Lucy B. Holmes, Independent Executrix, on behalf of the Estate of Harry Holmes, Deceased, hereafter called Respondent, prays the Court to affirm the judgment of the Circuit Court of Appeals for the Fifth Circuit and files herewith her Brief in reply to a Brief heretofore filed herein by the Solicitor General, on behalf of the Commissioner of Internal Revenue, hereafter called "Petitioner."

Opinions Below

The opinion of the Tax Court (R. 11-20) is reported at 3 T. C. 571. The opinion of the Circuit Court of Appeals (R. 39-44) is reported in 148 F. (2d) 740.

Statement

The Statement of Facts in the Brief for the Petitioner is substantially correct, and may be summarized as follows (with slight interpolations):

Harry Holmes, on January 20, 1935, executed the Trusts instrument naming himself as Trustee (with successors) and setting up three equal separate trusts for his three sons, Harry Holmes, Jr., John B. Holmes, and Thomas J. Holmes (22, 19 and 14 years of age respectively—R. 3). Under each trust the trustee was directed to use the income therefrom, subject to spendthrift provisions, for the respective beneficiary for fifteen years, at which time such beneficiaries should receive the corpus.

If any son died before the termination of the trust, leaving issue, such issue would receive the income until he reached the age of twenty-one years, when he would receive the corpus.

If any son died before termination of the trust, without issue or leaving issue who died before reaching the age of 21, such trust should enure to the beneficiaries of the other two trusts.

During the trust, the Trustee and his Successor Trustee had the power to use part of the corpus for the benefit of the respective beneficiaries, or to terminate any or all of the trusts prior to the end of the fifteen-year period, and in the event of such termination, the entire trust corpus remaining, would pass to the beneficiaries then entitled to receive it.

Termination of any one trust would put an end to any contingent rights in that trust held by beneficiaries of the other two trusts, and would put an end to any contingent rights of the terminated beneficiary in the other two trusts (R. 36).

Question Presented

Respondent contends that decedent, Holmes, had no power in any capacity, either directly or indirectly, to change the enjoyment of any of his three sons as to the one-third of the corpus or income therefrom originally vested in each of them; that any contingencies involved are trivial and remote, and that any changes of enjoyment, even of contingencies, could result only from Acts of God, unconnected with decedent's power, and not from the exercise of the power itself. Petitioner contends that not only the contingencies but the *entire* trust properties are includible in decedent's estate under Sec. 811 (d) (2) of the INTERNAL REVENUE CODE, because—(a) if any one or more of the three trusts were terminated prior to 15 years, *and* (b) if any of the three sons died *after* the termination and *before* the end of the 15-year period, then the enjoyment of the *survivorship contingencies* might be *different* than if the trust had not been terminated.

The questions are:

1. Was the power of termination the equivalent of a power to *alter, amend* or *revoke* within the wording or meaning of the Act?

2. Were the contingent interests subject to change of enjoyment by the exercise of such power?

3. Were such contingencies too trivial and remote for consideration?

4. If all the first three questions should be resolved in petitioner's favor, would that entitle the Commissioner to include for tax purposes only the value of the contingencies in question, or should the value of the entire trust property—including the vested interests—be included?

Summary of Argument

Each of decedent's three sons had a fee simple title to one-third of the trust corpus and income therefrom subject only to trust management for a maximum of fifteen years, and subject to *living* until the end of the trust management (termination).

Nothing decedent had the power to do could in any way (directly or indirectly) change the enjoyment of this vested right of the first takers—even if the grantor-trustee could withhold every penny of income, the sons would receive their full share with all accumulated income if they lived until the end of the 15-year period or until the trust management was sooner ended. If they lived for the fifteen years, there could be no change of enjoyment to anyone even if the first takers had theretofore received their full share as a result of termination.

This vested estate in the three sons had a definite value at decedent's death over which decedent retained no powers of any description—he could not decrease the basic estate of any son or shift any part of it from one to the other.

However, the Commissioner has sought to include not only the value, if any, of the contingencies hereafter mentioned but is seeking to include for tax purposes the entire trust corpus including the vested interests which have a far greater value than the contingent remainders upon which petitioner's theory of taxation depends.

There are several contingencies which could be terminated under the power and to this extent only, the power of termination might be the equivalent of a power to revoke or alter; but no "change of enjoyment" could occur at the time or be brought about by the termination itself. In fact a contingency can never be enjoyed until the happening of that condition precedent which gives it life and in this case it would be only the happening of such conditions which

could change enjoyment. For example, in the absence of death of a primary beneficiary before the end of fifteen years there would be no change of enjoyment regardless of whether the power had or had not been exercised. Therefore, the contingency, not the power, would change the enjoyment.

Assuming only for the purpose of argument that even a contingency might be "enjoyed" in anticipation, and that a change of such an imaginary enjoyment was within the contemplation of Congress, petitioner must establish that such enjoyment has a value which is more than "trivial" and if it does, then such value is all that may properly be included in decedent's estate for tax purposes—not the value of the entire trust property.

A flight of imagination into the possible contingencies can serve no purpose except to illustrate the triviality of the interest claimed to be taxable—and possibly to furnish a guide to the tax court if this court should think it worth while to remand the case for determination of the value of such contingencies.

It should be noted that Respondent is not relying upon these contingencies and "niceties of conveyancing" to avoid taxation. Petitioner is relying upon them in an effort to impose a tax.

According to the ages of decedent's sons and their life expectancy, the first contingency to their issue would have no value.

If the first takers or any of them died after termination and within fifteen years leaving issue, such issue would probably take as heirs or devisees.

The second contingency or "contingency upon a contingency" was that if the first taker died before termination and within fifteen years and if he left no issue surviving, then the beneficiaries of the other trusts would take under the in-

strument that which they might also have taken as heirs in any event.

The other contingencies start with the first taker dying before termination with issue. If the issue does not live to be 21 years of age, the other beneficiaries of the trust or their issue take his share which they also probably would have inherited.

We submit that the possibility of actual changes in enjoyment, even among contingencies, are more remote and trivial than the contingencies themselves, and that all of the contingencies in question are too trivial and remote to have any value. However, if any value is includible in decedent's estate, it must be restricted to the value of these contingencies.

ARGUMENT

Respondent's First Point

The Trust Indenture involved in this case reserved no power in the grantor either as an individual or as Trustee, which was the equivalent of a power to alter, amend or revoke the trusts. He had only the power as Trustee, to terminate the trusts and thereby accelerate the time when the vested beneficiaries might enjoy the corpus of the trusts which had already been irrevocably given to them in fixed interests by the Trusts Instrument. Any change of enjoyment to contingent interests which might indirectly result, could only affect trivial matters, and could not effect a change in the enjoyment which would be the equivalent of a power to alter, amend or revoke under Sec. 811(d)(2), Act of 1936, or under any prior Act.

Argument

In this case Petitioner seeks to extend to the present fact situation the reasoning used by the Circuit Court of Appeals for the Third Circuit in the case of MELLON v. DRISCOLL, 117 F. (2d) 477, cert. denied 313 U.S. 579; and the reasoning used by the Circuit Court of Appeals for the Second Circuit in the case of COMMISSIONER v. HOFHEIMER, 149 F. (2d) 733.

In the MELLON case, the original Trust only included the income to the two children for life, plus powers of appointment by Will. This Trust contained spendthrift provisions and a power in the Grantor to terminate the Trust. In the event of such a termination, the grant of income for life with powers of appointment over the corpus, would be automatically revoked, and the title to the entire corpus of the estate would thereupon pass in fee simple from the Grantor and Trustee to his children.

In the HOFHEIMER case, the First Trust was one in which the net income was in trust for the benefit of Clara Hofheimer for life, with the principal, at her death, to be distributed to the settlor's children, if living, otherwise to their issue. The Grantor-Trustee there, reserved the power:

> "of terminating this Trust, or from time to time amending its terms in respect to the payment of income to the beneficiary and of imposing any terms and conditions whatsoever in respect to the amount of income thereafter to be paid or the circumstances under which any income shall be payable; and upon the termination of the Trust as aforesaid, the principal of said fund shall be distributed as hereinbefore provided."

In other words, the Grantor-Trustee in that case could at any time amend the Trust and *cancel out* the life estate in

the first taker, and could revoke the income back to himself or give it to others. He could also transfer the corpus, freed of such life estate, to the remaindermen. Certainly, the life estate was subject to revocation or amendment, and there is no question about the life estate being includible. The Circuit Court of Appeals in the HOFHEIMER case, however, went further and held that the remainder interests were also includible under the theory that the power to at any time vest the *then living* remaindermen with complete title would be a power,

> "to change the enjoyment of the remainder interest from an *indefinite* period in the future by remaindermen whose identity and number were not presently known to the immediate present, by individuals who were known." (Italics ours.)

Such change of enjoyment was there held to be more than trivial.

In the case now before the Court, the Petitioner is attempting to apply these holdings to a different fact situation, and we wish to observe here that Petitioner is not seeking to include in decedent's estate for tax purposes simply those contingent remainders which he claims to be subject to change of enjoyment; but the Commissioner has sought and now seeks to include in decedent's estate for tax purposes, the value of the entire Trust properties.

In this case, the Trusts Instrument created for the benefit of decedent's three sons, Harry, John B. and Thomas, three Trusts, each covering an undivided one-third interest in the Trust corpus. If any or all of these three boys lived fifteen years, no power exercisable by either Grantor-Trustee (in any capacity) or any Successor Trustee, could divest, revoke, alter, change, amend or terminate their respective one

third interest in the Trusts corpus or in accumulated income therefrom. Petitioner in his statement of the Question Presented (Petitioner's Brief, p. 2) calls these primary beneficiaries "income beneficiaries" and in his Summary of Argument (Petitioner's Brief, p. 9) calls them "contingently entitled to enjoyment;" but these misleading references to the primary estates created should not detract the Court's attention from the obvious facts that such estates were *vested* and had a *value*—which value should not be included for tax purposes. According to Respondent's petition in The Tax Court (R. 2), Harry Holmes, Jr., was 27 years of age; John B. Holmes was 24 years of age, and Thomas J. Holmes was 19 years of age at the date of decedent's death on October 5, 1940, which would have made them all nearly six years younger at the date the Trusts Indenture was executed.

These ages were not contested in The Tax Court. In fact Petitioner's principal contention at that time was that the entire corpus was includible on the theory that the 1936 Amendment was "strictly declaratory" of prior law and that a power of *any type* of termination was within the language of the Act prior to 1936, and that "termination" meant the same thing as "revoke." The Commissioner in taking such position was relying upon that part of TREASURY REGULATIONS 105, Sec. 81.20, which reads as follows:

> "The Third change * * * consists of the addition of the words 'or terminate' following the words 'to alter, amend, revoke.' Such addition is considered but declaratory of the meaning of the subdivision prior to the amendment." (Appendix, infra p. 31.)

The Commissioner in taking that position was ignoring the

language of the Regulation, which immediately followed that above quoted, and which is as follows:

> "A power to terminate capable of being so exercised as to revest in the decedent the ownership of the transferred property or an interest therein, or as otherwise to inure to his benefit or the benefit of his estate, is to that extent, the equivalent of a power to 'revoke,' and when otherwise so exercisable as to effect a change in the enjoyment is the equivalent of a power to 'alter.'" (App., infra p. 52.)

It was only after the appeal to the Circuit Court, that the Commissioner seriously contended that the power of termination in this trust actually was the equivalent of a power to "revoke" or "alter" because of the possibility of a change of enjoyment in the contingencies.

The facts alleged by Respondent before The Tax Court, bearing on the ages of the primary beneficiaries may be presumed to have been found by The Tax Court in accordance with its Judgment (DOBSON v. COMMISSIONER, 320 U.S. 489, 64 S. Ct. 239); and the Courts may give judicial notice to recognized Mortality Tables. (20 AMERICAN JURISPRUDENCE 113, Sec. 99.) According to the recognized Mortality Tables, each of these three boys had a life expectancy of more than twice as long as fifteen years, both from the date of the execution of the Trust Instrument, and from the date of decedent's death. The possibility that they would not live out their expectancy had no value, either actual or recognizable at law, at either time. Any contingencies, therefore, based upon the possibility of their failure to live for fifteen years, would certainly be too *trivial* for consideration by this Court. DORT v. HELVERING, 69 F. (2d) 836; MELLON v. DRISCOLL, 117 F. (2d) 477, cert. denied, 313 U.S. 579; COMMISSIONER v. HOFHEIMER'S ESTATE, 149 F.

(2d) 733. This, however, is not the extent of the triviality of the contingencies upon which Petitioner bases his case. Even if any of the three sons should die, after termination and within the fifteen-year period, leaving issue surviving, such issue would in all probability enjoy the property as "heir," the same as if he had received it as "issue" under the trust.

In fact it is difficult to imagine how and in what manner a "contingent" interest may be *enjoyed* at all prior to the happening of its condition precedent as mentioned in petitioner's brief (Note 3, page 14). Following that language further, a contingency may be "vested" at law subject to "complete defeasance"—in fact it never ripens into enjoyment until the occurrence of that condition precedent necessary to give it life.

Until an estate ripens into enjoyment, its enjoyment may not be *changed*—except possibly in contemplation or wishful thinking. If any of the contingencies in this case had occurred prior to the exercise of the power, the power could not *change the enjoyment* of the vested estate— it would no longer be contingent.

The court in the HOFHEIMER case spoke of "contingent remainders" but in fact those were *vested remainders* of the corpus in children and issue—following a *full life* estate. Exercise of the power cut out all *vested* remainders in favor of one particular one. Exercise of the power in the HOLMES case only cut off contingent interests which up until that time had not matured, and in all probability never would have come into enjoyment in any event.

The interest, therefore, which Petitioner claims to be subject to change is so completely trivial and remote as to be not only beyond the possibility of valuation, but beyond any reasonable contemplation, either by the Court or by the decedent at any time he might have exercised the power.

These sons had a vested interest in their respective one-third shares of the corpus, subject only to remote and unlikely contingencies. The primary beneficiaries in the MELLON case, on the other hand, never had anything except a right to income for life in the event the Grantor chose to let them have it. In this connection the spendthrift provisions, together with other powers, in the Mellon Trust could, at the election of the Grantor, prevent his children from ever personally receiving any of the income or corpus of the Trust. The power reserved by the Grantor in the MELLON case was, therefore, the power to revoke that interest which in his discretion might amount to nothing so far as the first takers were concerned, and to transfer to those first takers a complete fee simple title which had remained in Grantor and which they could never have received under the Trusts Instrument and which (since the Grantor's death without the exercise of power) they will never receive so long as they live. There were *no* contingent remainders involved in the MELLON case.

In the HOFHEIMER case, the ultimate enjoyment of the remainders under the Trust Indenture were subject to a preceding life estate which might have lasted one year or seventy-five years. The fact that it was necessary to their enjoyment that the remaindermen be alive at the end of an "indefinite" period (the end of the life estate), was the thing seized upon by the Circuit Court of Appeals in deciding that the possibility of changes in enjoyment in that case could not "be regarded as being trivial." Certainly, remaindermen could be and very probably would be different if the preceding life estate should (as it very likely might) extend over a long period of time. These were *vested* remainders which the exercise of the power would revoke in favor of persons who otherwise had only a contingent right depending upon their outliving the life tenant.

In the case now before the Court, there was nothing "indefinite" as to the time when the full title would pass. If the primary beneficiaries were alive at the end of fifteen years (as they were likely to be) no power exercisable by the Grantor-Trustee in any capacity, could prevent their complete enjoyment in accordance with the original instrument, not only of their full one-third interest of the corpus but also as to all accumulated income, if any, which had been withheld under the spendthrift provision. That the primary beneficiaries would themselves be living at the end of fifteen years was not a "contingency" nor a "possibility"—it was a distinct probability according to the only human means of calculating the extent of life, or the time of death; that is, the Mortality Table. There were further distinct probabilities that even if any of the sons should die, after termination and within fifteen years, his surviving issue would be his heirs or devisees.

Petitioner has, for the first time in this Court, laid particular emphasis on the spendthrift provisions entitling the Trustee to withhold income and to those provisions empowering the Trustee to use part of the corpus in either of the Trusts for the welfare, happiness, etc., of the beneficiary of that particular Trust. These points were not particularly pressed or urged either in The Tax Court or in the Circuit Court of Appeals, and were not listed under the "Question Presented," "Statement of Points to Be Urged," or "Summary of Argument" in the Petition for Writ of Certiorari. In fact, we do not believe that the Trustee's power to "invade" the corpus for the beneficiaries (not for himself) has ever been raised before. We doubt, therefore, that these points should now be considered in this case by this Honorable Court. SONZINSKY v. UNITED STATES, 300 U.S. 506, 81 L. Ed. 772, 57 Sup. Ct. 554; OWENS v. UNION PAC. R. CO., 319 U.S. 715, 87 L. Ed. 1683, 63 Sup. Ct. 1271.

A holding in this case that spendthrift provisions would invalidate this Trust for tax purposes would cast a cloud upon the validity of every Trust containing spendthrift provisions.

Suffice to say that the spendthrift provisions in this instrument gave the Grantor-Trustee no greater power than he had with reference to the corpus—although he might withhold income, he could not divert it from the particular Trust to which it accrued, and he could not prevent the ultimate enjoyment of it by the beneficiary—subject only to those remote and unlikely contingencies, based on life or death of others than decedent. The spendthrift provisions in the MELLON case, supra, applied to beneficiaries who had no more than a life estate in income to start with and might have deprived them of that.

The power of the Trustee to "invade the corpus" is little different in legal effect than is the power of termination—in either case the beneficiary would receive part (or all) of the corpus prior to the end of the maximum term provided in the Trusts Instrument.

The power of termination in this case was not a power which could affect any of the rights of the first takers, Harry, John B., and Thomas, to their respective one-third interest in the corpus or the income therefrom; and we submit that in any event, the value of these interests should not be included in decedent's estate. If any contingency is subject to change of enjoyment as contended by Petitioner, then only the *value* of such contingencies are includible. COMMISSIONER v. BRIDGEPORT CITY TRUST CO., 124 F. (2d) 48, certiorari denied, 316 U.S. 672; TAIT v. SAFE DEPOSIT & TRUST CO., 74 F. (2d) 851. See Annotation, 139 A.L.R. 555.

Respondent's Second Point

Even if the possibility of change of enjoyment in the remote contingencies were not too trivial for consideration by the Court, such changes of enjoyment could not be brought about by the exercise of the powers held by Grantor-Trustee, but could be brought about only by Acts of God (death) occurring after any exercise of the power, entirely beyond decedent's control, and which he could not anticipate at any time he might exercise the power. Such changes of enjoyment brought about by the subsequent death of beneficiaries could not be said to have happened as a result of any act of volition by the Trustee, and could not be among those powers of control which Congress intended to penalize.

Argument

Petitioner's entire position in this case is based upon the claim that the Trusts Instrument, by reason of its survivorship provisions, created contingencies, the enjoyment of which might be changed by the happening of such contingencies after the exercise of the power of termination, but before the end of the maximum Trust period originally provided. As heretofore pointed out, Petitioner has not sought to tax these contingencies or have them valued for the purposes of including them in decedent's estate. In fact, an attempt to do so would hardly be worth while as they have no value, either actual or within the contemplation of the law. There is, however, another apparent fallacy in Petitioner's position. The possibilities of changes of enjoyment in these contingencies depend not upon the exercise of the power, but upon Acts of God occurring after the exercise of the power, and prior to the end of the trust period origi-

nally provided. In other words, the exercise of the power to terminate does not *itself* bring about any change of enjoyment, even in the contingencies, because any of such contingencies which occurred prior to the exercise of the power, would be binding upon the Trustee on his termination—the estate would pass to the contingent remaindermen; and the Trustee, at any time he exercised the power, could not know, control, or even guess whether any of the contingencies provided in the original instrument would thereafter occur, or not. In fact, Petitioner's position would be just as valid as it now is, even if there were no survivorship contingencies provided in the Trust, because the simple, common, ordinary provisions for the management and control of Trusts might result in a similar change of enjoyment, even if the beneficiary had simply been "John Doe or his heirs." Any act of any ordinary Trustee might, under this theory, have the indirect effect of changing the enjoyment as between the first taker and his heirs.

In other words, the undeniable effect of Petitioner's argument is that any power of termination in any Trust (even though executed prior to the 1936 Amendment), regardless of the meaning of the power of termination, regardless of its effect, and regardless of the infinitesimal interest or possibility of interest affected thereby, would make the entire Trust corpus includible in decedent's estate for tax purposes.

Petitioner admits this in effect at page 17 of Petitioner's Brief in this Court, Note 5, where Petitioner states:

> "It is difficult, moreover, to envisage a situation involving only acceleration and without any other changes in enjoyment."

Under Petitioner's argument there certainly could be no case of an acceleration without a change of enjoyment.

In this case, the Trustee, at any time he might have exercised the power of termination, could not know or even guess which of the beneficiaries might possibly thereafter die, and, therefore, the Trustee could not contemplate whether the terminated beneficiary would be hurt by eliminating his contingent interest in the other two trusts, or whether the beneficiaries in the other two trusts would be hurt by eliminating their contingencies in the terminated trust. Likewise, the Trustee could not know or even contemplate which of the beneficiaries might possibly be benefited by a death subsequent to the exercise of the power.

In the same manner, if the Trusts had been for the benefit of the three sons and "their heirs" without any survivorship provisions, the Trustee, at any time he might have exercised the power, could not have anticipated whether the primary estate would be "appointed by Will," spent, or increased by diligent investments, by the first taker; and therefore, the Trustee could not know or contemplate whether those persons who might have been the "heirs" at the end of the maximum term of the original trust would take more or less in case the first taker had previously died.

The fact is that Petitioner has by technical argument and imaginary hypothesis again arrived at his original position before The Tax Court to the effect that the Act, prior to the 1936 Amendment, meant exactly the same thing as the Act applicable after the 1936 Amendment, and that under the Act applicable prior to 1936, there could be no termination of any kind without effecting a change of enjoyment. The mere fact that Congress made one section of the Act applicable to trusts executed before the date specified in the Act, and another section applicable to trusts executed thereafter, would indicate that Congress had an intent and purpose to make some distinction, and to exempt from taxa-

tion properties subject to some types of trusts which could be terminated by the decedent.

We submit that the Congressional intent must be recognized by this Court if that intent may be determined by reasonable inference from the Act; that the theory of Petitioner is too technical and based too much upon imaginary hypothesis to warrant serious consideration by the Court; that the reasonable Congressional intent can be inferred from the Act; that one reasonable inference is that under the section of the Act applicable prior to the date specified therein, property would not be includible unless (in the wording of the Act) "the enjoyment thereof was subject at the date of his death to any change (actually brought about) through the exercise of a power * * * to alter, amend or revoke." (Parenthetical matter inserted); that another reasonable inference is that Congress did not intend to include powers of termination where any change of enjoyment resulting from Acts of God occurred after the exercise of the power, could not be said to have been the result of any *volition or control* by the decedent.

We doubt if the records of the Ways and Means Committee with reference to the advisability of adding the word "terminate" (quoted in Petitioner's brief at page 26) could be considered as indicative of the Congressional intent at the time the PRIOR act was passed. Such records might indicate that Congress intended the word "terminate" as added in the new act to be considered only as the equivalent of "revoke"; but that question is not before the Court in this case and we mention it only in answer to Petitioner's argument as to the meaning of the record. Certainly there is nothing in the legislative history indicating a Congressional feeling that the word "terminate" should be read into the prior act except insofar as termination might in any particular case be the equivalent of revocation.

These purposes of Congress would have been strictly in accordance with the general intent and purpose of the Act taxing estates *owned* by decedents at the time of their death, or over which such decedents exercised a control involving substantial incidents of ownership.

Where the Decedent could not even anticipate how, or in whose favor, or in what manner a change of enjoyment might come about as a result of the subsequent death of other parties, it certainly could not be said that the power contained any of the ordinary incidents of ownership or control.

The word "terminate" does not have the same meaning as the word "revoke" as applied in the case of MELLON, ET AL., v. DRISCOLL, supra.

The Commissioner, through all the history of this case, has claimed that the word "terminate," as added to the phrase "alter, amend, or revoke," in the 1936 Act, had the same meaning as the word "revoke," and was nothing more than declaratory of the word "revoke." The Commissioner then claims that this brings the HOLMES case within the rule of MELLON v. DRISCOLL, supra.

We do not understand the Court in the MELLON case, to say these two words have the same meaning, for, clearly, they do not. This is what JUDGE BLACK clearly understood, when in the decision in the HOLMES case he said:

> "If the word 'terminate' is understood to have the meaning that the Court gave it in Mellon v. Driscoll, then we agree that it is embraced by the word 'revoke' as the statute existed prior to its amendment in the 1936 Act, passed June 22, 1936" (R. 16).

WEBSTER'S NEW INTERNATIONAL DICTIONARY, Second Edition, Unabridged:

REVOKE: To recall. To annul by recalling or taking back; to repeal; to take back; to reassume; to recover; to draw back. To restore to use or operation.

TERMINATE: To put an end to; to make to cease; to end. To come to a limit in time; to end; close; to have its end; final part, or outcome.

WORDS AND PHRASES:

REVOKE: Revoke means to annul or make void by recalling or taking back, cancel, rescind, repeal, reverse. Revoke means to recall, take back or to repeal.

Very clearly revocation terminates a trust, but just as clearly "terminate" as provided in the Holmes Trust, bears no relation or resemblance to revocation and only terminates the *trust*, not the vested interests of the beneficiaries.

Thus, "revoke" in the MELLON case, if the right were exercised by Mellon, would have meant, beyond any doubt whatever, that the Mellon children would have received the corpus of the trusts and this corpus was not by any stretch of the imagination, granted to them in the Trust Instrument. It would have been "a change in the amounts they are to take." (See HASSETT v. WELCH, 303 U.S. 303.)

In the HOLMES case, all of the corpus of the property and the income therefrom, were by the Trusts Instrument irrevocably vested in the three beneficiaries in three divided and equal interests, and if Holmes, either as grantor or as trustee, had exercised the right to terminate the trust, he could only have terminated his rights of trust management and advanced the time of enjoyment. He could make no change in the amounts they were to take; but could only change *when* they were to take it. ESTATE OF OSCAR H. PERRIN, ET AL., EX-

ECUTORS, v. COMMISSIONER, Dec. 13,806 (M) C.C.H., Dkt. #580, U. S. Tax Ct., Memorandum Opinion March 13, 1944, Treasury Regulations 108, Sec. 86.3.

We do not believe, therefore, the Commissioner can stretch the word "terminate" in the HOLMES case to mean "revoke" or that the HOLMES case comes within the rule in the MELLON case.

Respondent's Third Point

A power of termination which was merely the equivalent of a power to accelerate the time of enjoyment by beneficiaries holding vested interests was not the equivalent of a power to alter, amend or revoke.

Argument

As pointed out in the argument under Respondent's First and Second Points, Congress must have considered the word "terminate" to have *some* meaning other than alter, amend or revoke, or Congress would not have re-enacted the subsection applicable to transfers on or prior to June 22, 1936.

In accordance with the language of TREASURY REGULATION 105, Sec. 81.20, any power of termination would be permissible unless it was the equivalent of a power to alter, amend or revoke.

In ordinary usage "termination" when applied to trusts would mean to bring to an end the powers of the trustee s that the beneficiaries would thereafter own their beneficial interests unburdened with the trust. Both the Circuit Court of Appeals and The Tax Court called this an acceleration of the time of enjoyment and held that it was not the equivalent of a power to alter, amend or revoke.

Such holding was not in conflict with any authority whatsoever and no conflicting authority has ever been cited by Petitioner. On the contrary the reasoning of the Court below

is sustained by Treasury Regulations and respectable authority.

TREASURY REGULATIONS 108, Section 86.3, reads:

> *"A gift shall not be considered incomplete, however, merely because the donor reserves the power to change the manner or time of enjoyment thereof.* Thus, the creation of a trust the income of which is to be paid annually to the donee for a period of years, the corpus being distributable to him at the end of the period, and the power reserved by the donor being limited to a right to require that, instead of the income being so payable, it should be accumulated and distributed with the corpus to such donee at the termination of the period, constitutes a completed gift." (Italics ours.)

ESTATE OF OSCAR H. PERRIN, ET AL., EXECUTORS, v. COMMISSIONER, Dec. 13,806 (M) C.C.H., Dkt. No. 580, U. S. Tax Ct., Memorandum Opinion March 13, 1944. Because of the similarity of this case to the case at bar, we quote from the decision of The Tax Court:

> *"Estate tax—No power to change proportionate shares payable to trust beneficiaries.*—The value of a trust, created in 1935, for the education of two grandchildren, providing for the payment of amounts of income and principal not exceeding a stipulated maximum during the course of their college career, or if they should not go to college, during four years, and *then so much as necessary for their support and maintenance until they reach the age of thirty when* the balance should be paid over to them, equality to be maintained between them, *Held*, not includible in the estate of the settler-Trustee. A power to alter, amend, or revoke the enjoyment of the trust was not retained by the settler-Trustee. (Italics ours.)
>
> *"Estate tax—No power to change total share payable*

to trust beneficiary. The value of a trust, created in 1937, for the education of a third grandchild, payments to be made as in the case of the above trust in favor of the two grandchildren, and upon her reaching the age of thirty the balance to be paid to her, *held*, not includible in the estate of the settler-Trustee, in the absence of a reservation by the settler-Trustee of the power to change the enjoyment of the trust."

This case, though very similar to the case at bar, was acquiesced in by the Commissioner. Here the settler-trustee could vary the time of enjoyment until the beneficiaries reached 30 years of age, and if they failed to live the 30 years such variation might deprive them of personal enjoyment of part of the trust property.

In the case at bar, Holmes, by reserving the right to terminate the trusts as trustee, could as to primary shares to the sons only advance the date of enjoyment by the beneficiaries of the exact part of the trusts which would surely and certainly go to each beneficiary as fixed in the Indenture.

The gift tax and the estate tax are closely related. SANFORD'S ESTATE v. COMMISSIONER, 308 U.S. 39; HIGGINS v. COMMISSIONER, 129 Fed. (2d) 237, cert. denied, 63 S. Ct. 57. A case construing the gift tax will not necessarily control in an estate tax case; but the construction of trusts and the title passing thereunder are common to both.

Respondent's Fourth Point

The decision of the Circuit Court of Appeals was not based either upon the fact that decedent could not revest himself with title, or upon the theory that the Trusts Instrument itself gave the decedent as Trustee, the power to change enjoyment. On the contrary, the Circuit Court of Appeals held that the de-

cedent in this case would not have the power under the instrument, to change the enjoyment of any interest held by the beneficiaries, and would not have the power to alter the benefits received by them.

Argument

We do not contend, as inferred by petitioner at page 18 of his brief, that this Honorable Court erred in the case of PORTER v. COMMISSIONER, 288 U.S. 436. Neither do we contend that the Treasury Regulation quoted by Petitioner at page 27 of his brief (Sec. 81.20, TREASURY REGULATIONS 105—App., infra p. 31) is necessarily in error. In fact, the Circuit Court of Appeals in its decision below, was simply paraphrasing the Treasury Regulation upon which Petitioner relies in using the language which Petitioner now says casts the Circuit Court in conflict with the decision of this Honorable Court in PORTER v. COMMISSIONER, supra. The language quoted by the Circuit Court from the Treasury Regulation is as follows:

> "A power to terminate capable of being so exercised as to revest in the decedent the ownership of the transferred property, or an interest therein or as otherwise, to inure to his benefit or the benefit of his estate, is, to that extent, the equivalent of a power to 'revoke.' * * * "

The language of the Circuit Court of Appeals, which immediately follows quotations by the Court of the Regulation and which language Petitioner claims was in conflict with PORTER v. COMMISSIONER, supra, is as follows:

> "The power to terminate was not capable of being so exercised as to revest in the decedent any legal or beneficial title to any interest in the Trust property,

nor could it operate to empower the decedent to choose different beneficiaries from those named, *or to alter the benefits received by them*" (R. 42). (Italics ours.)

If the Court omitted part of the Treasury Regulation, such omission was supplied in the Court's holding above quoted.

To make it clearer, we reiterate, we are not relying solely upon the fact that decedent could not "recapture" any interest in the property—the fact that he could not, is certainly an element which may be mentioned in the development of any opinion by the Court or any discussion of this case (as it was stated in the Regulation itself) without convicting the Court of contending that if decedent reserved no such power, he might reserve any other type of power prohibited by statute. In fact, the Circuit Court of Appeals in its Opinion specifically recognizes the holding of this Court in PORTER v. COMMISSIONER, supra; and in the same sentence where it was observed that decedent reserved no power to revest in himself any interest in the trust property (within the language of the Treasury Regulation) the Circuit Court of Appeals went on to say that in its opinion, decedent likewise did not reserve the power to "choose different beneficiaries from those named, or to alter the benefits received by them."

At pages 18 and 19 of his brief Petitioner also infers that the Circuit Court of Appeals, in its decision, relied upon a theory that it would be permissible for the decedent to reserve a power to change or alter the enjoyment of any interest created in the Instrument. We submit that the Circuit Court of Appeals made no such holding, but on the contrary, specifically held that in its opinion, the decedent in this case would not have the power "to alter the benefits received by them (beneficiaries)." (Parenthetical matter interpolated.) (R. 42.) All of the cases cited by petitioner at

pages 18 and 19 of his brief hold that decedent cannot under the statute reserve the power to change beneficiaries or to alter the amounts they are to receive. We do not contend that these decisions are in error and neither of the Courts below so held.

We cannot refrain from suggesting that a serious mistake has been made in attributing to the Circuit Court of Appeals definite holdings which it did not make, and that such mistake should be corrected by this Honorable Court.

Respondent's Fifth Point

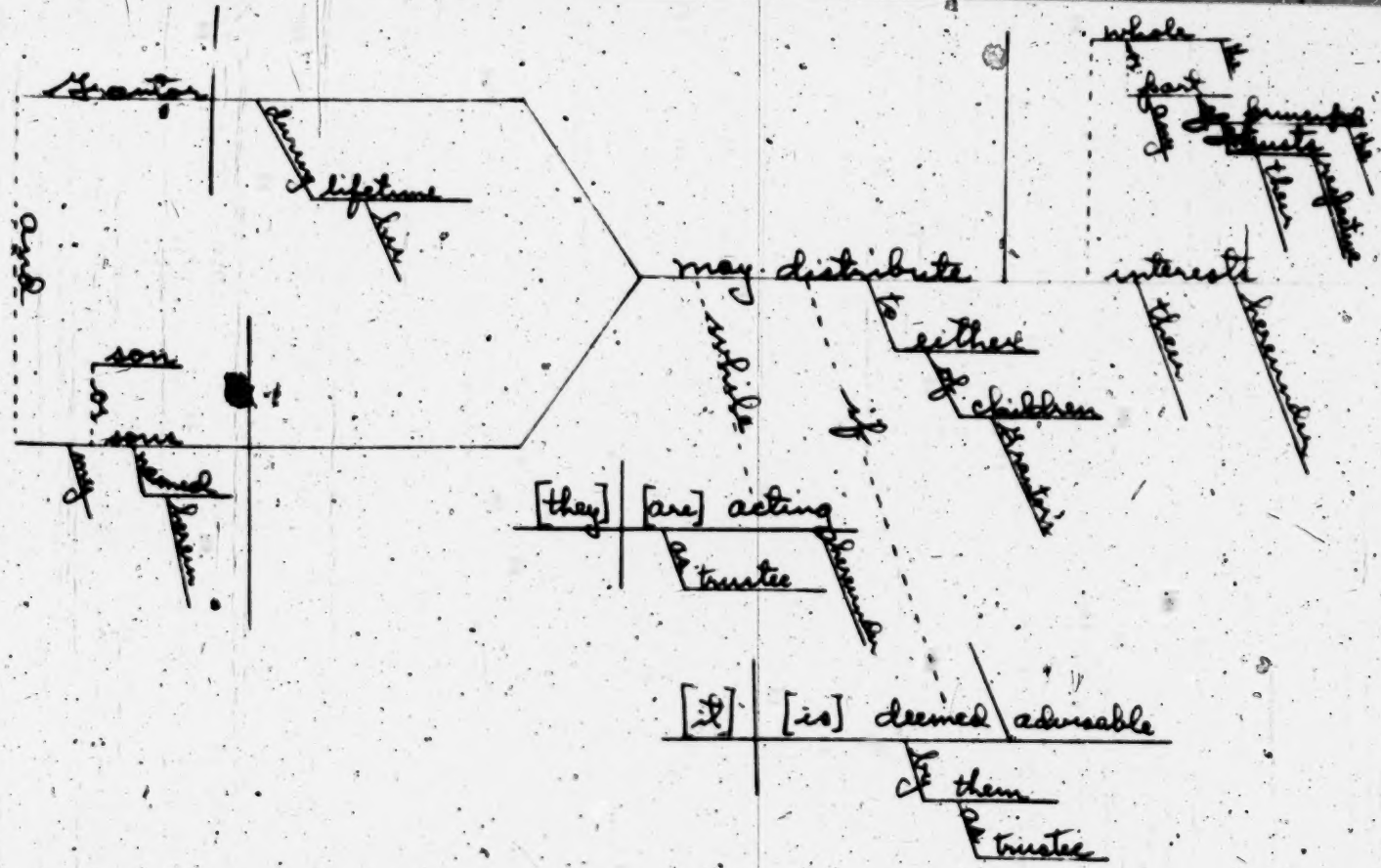
While decedent had no power to alter, amend or revoke in *any* capacity, he had legal obligations and responsibilities to the beneficiaries as trustee which he did not have as grantor and this should be given consideration.

Argument

As indicated by Petitioner, we contended in the Circuit Court of Appeals that decedent's powers in the trust were exercisable by him only as trustee. A Trustee has definite legal and equitable responsibilities to the beneficiaries of a trust which even a father does not have individually to his children. For that reason, we do not think that it *must* be inferred as Congressional intent to include within powers reserved to a "decedent" (within the meaning of the Act applicable prior to the 1936 Amendment) those powers exercisable by him only in his capacity as Trustee.

Powers held by decedent only as trustee cannot pass by inheritance or devise within the generally accepted purpose of the tax assessed against *estates of decedents*. Such powers pass under the original instrument to Successor Trustees.

Therefore, we submit herewith our Exhibit "A" which is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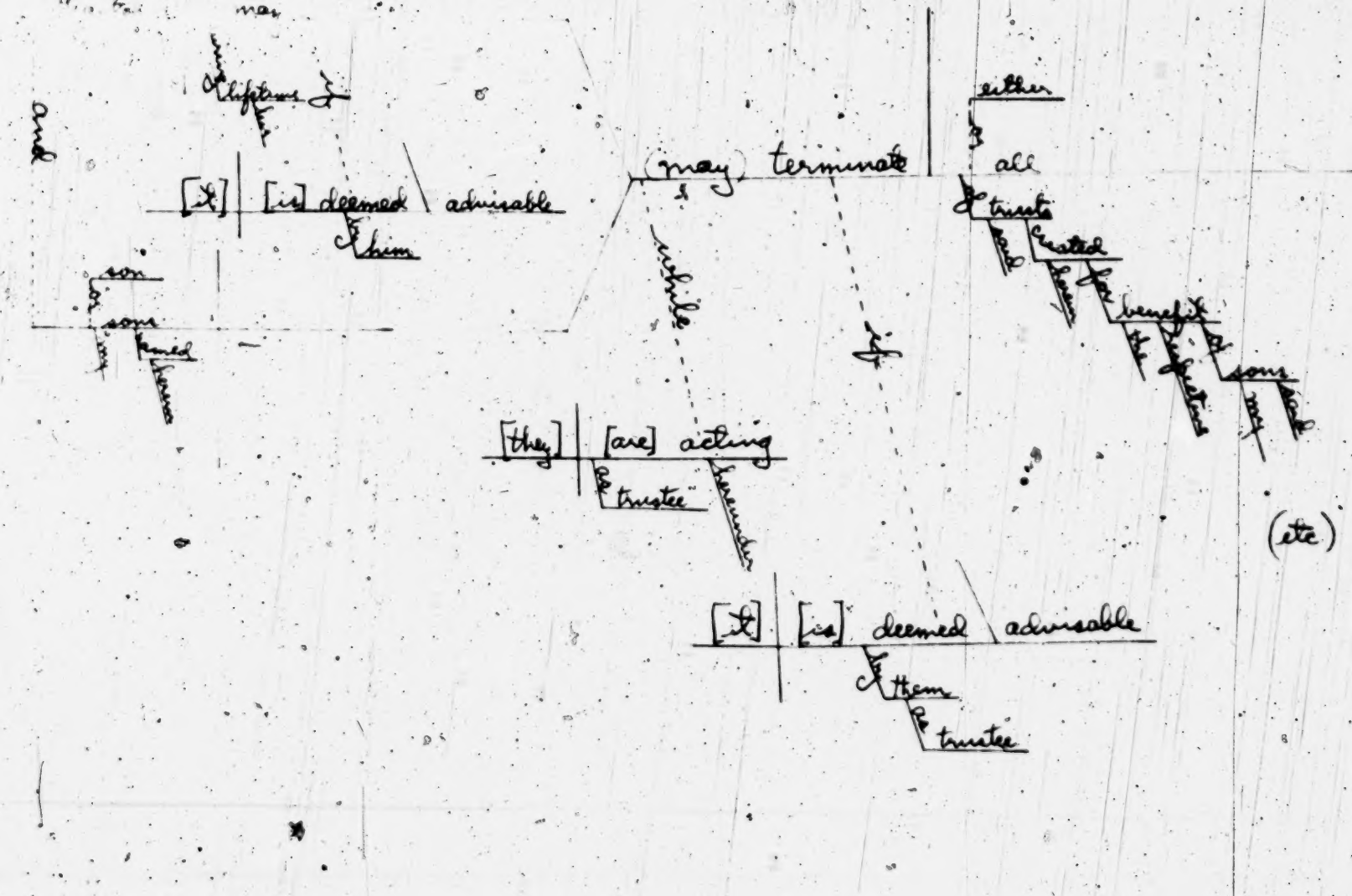
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a correct grammatical diagram of the power of partial distribution and our Exhibit "B" which is a correct grammatical diagram of the power of termination. We believe that the only power here was one which did not pass by death of Holmes, and which (prior to 1936), Congress did not intend to tax.

Certainly, the language "in any capacity" was not inserted in the Act until 1936 and it is well settled that in case of doubt a taxing act will be construed in favor of the taxpayer. HASSETT v. WELCH, 303 U.S. 303.

We are certain, however, that the case does not necessarily turn on this point, for as heretofore stated, the decedent here did not have the prohibited powers in any capacity.

Conclusion

It is submitted in conclusion that the decedent's intention, as expressed from the entire instrument, was to make irrevocable gifts for the benefit of his three sons and that the only purpose of the power of termination was to permit them to receive their gifts prior to the end of the fifteen years provided by the Trusts Instrument.

We submit further that this power, at least to the extent of the primary estates vested in the three sons, was certainly not the equivalent of a power to alter, amend or revoke their rights. If any part of the trust properties was taxable, certainly the value of these primary interests should not be included, and the case, if reversed, should be remanded for determination of the value of the contingent interests claimed to be subject to change of enjoyment.

Respondent submits, however, that even the contingent interests, relied upon by Petitioner, are not properly includible in decedent's estate for two reasons:

First, they are too remote and trivial, and

Second, any change of enjoyment in the contingencies could not be brought about by the exercise of the power, but only through the happening of remote and improbable contingencies over which decedent had no control and could not have anticipated at any time he exercised the power.

All of the contingent interests which Petitioner claims were subject to change of enjoyment, were very obviously included in the instrument not to continue decedent's control over the property, within the meaning of the Act, but simply to provide that in almost every reasonable contingency the trust property would be enjoyed by decedent's sons, their issue, or their decedents.

The power of termination likewise was not a continuation of decedent's control within the meaning of the Act. He had *given* the property subject only to trust management for fifteen years. The power of termination was not designed to permit alteration, amendment or revocation of the beneficiaries' rights, but rather so that the Trustee could *release* the full title to the primary beneficiaries before the expiration of the fifteen-year trust period; thus, advancing the time of enjoyment.

In other words, the Trustee had the right under the instrument to continue his trust management for the maximum term. The law permitted such a trust, and it was no violation of either the spirit or the letter of the Act for the Trustee to have the power to release the powers of trust management at an earlier date if any of the primary beneficiaries matured sufficiently to properly manage his own property.

It is certain from the instrument itself that the decedent in providing this power of termination in the Trustee and

Successor Trustee, was thinking only of the primary beneficiaries, for their issue would not even be of legal age within the fifteen-year period—much less mature enough to manage extensive properties.

WHEREFORE, Respondent submits that the decision below should be in all things affirmed; but in the alternative, if it should be determined that any of the remote contingent interests are includible and have a value sufficient to justify inclusion in decedent's gross estate, the case should be remanded to The Tax Court for determination of the value of such contingent interests.

Respectfully submitted,

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Houston, Texas

Appendix.

INTERNAL REVENUE CODE:

Sec. 811. Gross Estate.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, whether situated, except real property situated outside of the United States—

* * *

(d) *Revocable transfers*—(1) *Transfers after June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona-fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death;

(2) *Transfers on or prior to June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a transfer shall be included in the gross estate under Para-

graph (1) unless it is includible under this paragraph; (26 U. S. C., Sec. 811.)

* * *

TREASURY REGULATION 105, promulgated under the estate tax provisions of the Internal Revenue Code:

Sec. 81.15 *Transfers during life.*—The following classes of transfers made by the decedent prior to his death, whether in trust or otherwise, if not constituting bona fide sales for an adequate and full consideration in money or money's worth, are subject to the tax: * * *. (5) transfers under which the enjoyment of the transferred property was subject at decedent's death to a change through the exercise, either by the decedent alone or in conjunction with another person or persons, of a power to alter, amend, revoke, or terminate, or where such a power was relinquished in contemplation of decedent's death (see Sections 81.20 and 81.21).

* * *

Sec. 81.20. *Transfers with power to change the enjoyment.*—(a) Transfers included.—Subsection (d) of Section 811 embraces a transfer by trust or otherwise (if not amounting to a bona fide sale for an adequate and full consideration in money or money's worth) when at the time of decedent's death the enjoyment of the transferred property, or some part thereof or interest therein, was subject to any change through a power exercisable either by the decedent alone, or by him in conjunction with some other person or persons, to alter, or amend, or revoke, or terminate. (See Section 81.15.)

The addition to Subdivision (d) (1) of the Revenue Act of 1926, by Section 805 of the Revenue Act of 1936, of the phrase to the effect that it is not material in what capacity the power was subject to exercise by the decedent or by the other person or persons in conjunction with the decedent (which phrase is also embodied

in Subsection (d) (1) of Section 811 of the Internal Revenue Code), is considered merely declaratory of the meaning of the subdivision prior to the addition of the phrase.

The second phrase added to this subdivision of the Revenue Act of 1926 by amendment in 1936 (also embodied in Section 811 (d) (1) of the Internal Revenue Code) namely, "without regard to when or from what source the decedent acquired such power," is not considered declaratory of the meaning of the subdivision prior to the amendment in a case in which no one of the powers enumerated in the subdivision was reserved at the time of the making of the transfer, but one or more thereof were conferred subsequent thereto (whatever the source from which conferred) without any understanding, expressed or implied, had in connection with the making of the transfer that such power or powers should be later conferred.

The third change made in the subdivision by the Revenue Act of 1936 (which is also embodied in subsection (d) (1) of section 811 of the Internal Revenue Code) consists of the addition of the words "or terminate" following the words "to alter, amend, revoke." Such addition is considered but declaratory of the meaning of the subdivision prior to the amendment. A power to terminate capable of being so exercised as to revest in the decedent the ownership of the transferred property or an interest therein or as otherwise to inure to his benefit or the benefit of his estate, is, to that extent, the equivalent of a power to "revoke," and when otherwise so exercisable as to effect a change in the enjoyment, is the equivalent of a power to "alter."

Treasury Regulations 108, promulgated under the gift tax provisions of the INTERNAL REVENUE CODE:

Section 86.3

* * *

As to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to change the disposition thereof, whether for his own benefit or for the benefit of another, the gift is complete. But if upon a transfer of property (whether in trust or otherwise) the donor reserves any power over the disposition thereof, the gift may be wholly incomplete, or may be partially complete and partially incomplete, depending upon all the facts in the particular case. Accordingly, in every case of a transfer of property subject to a reserved power, the terms of the power must be examined and its scope determined.

A gift is incomplete in every instance where a donor reserves the power to revest the beneficial title to the property in himself. A gift is also incomplete where and to the extent that a reserved power gives the donor the right to name new beneficiaries or to change the interests of the beneficiaries as between themselves. Thus, the transfer of an estate for life where, by an exercise of the power, the estate may be terminated or cut down to one of less value, and without restriction upon the extent to which the estate may be so cut down, constitutes an incomplete gift. If in this example the power was confined to the right to cut down the estate for life to one for a term of five years, the certainty of an estate for not less than that term results in a gift to that extent complete.

A gift shall not be considered incomplete, however, merely because the donor reserves the power to change the manner or time of enjoyment thereof. Thus, the creation of a trust the income of which is to be paid annually to the donee for a period of years, the corpus being distributable to him at the end of the period, and the power reserved by the donor being limited to a right to require that, instead of the income being so payable, it should be accumulated and distributed with the corpus to such donee at the termination of the period, constitutes a completed gift.

* * *

IN THE

SUPREME COURT OF THE UNITED STATES

No. 203

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ESTATE OF HARRY H. HOLMES, DECEASED,
LUCY B. HOLMES, INDEPENDENT EXECUTRIX,
Respondent

RESPONDENT'S PETITION FOR REHEARING

J. E. PRICE,
J. V. WHEAT,
Attorneys for Respondent

IN THE

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No. 203

COMMISSIONER OF INTERNAL REVENUE,
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ESTATE OF HARRY HOLMES, DECEASED,
LUCY B. HOLMES, INDEPENDENT EXECUTRIX,
Respondent

RESPONDENT'S PETITION FOR REHEARING

Lucy B. Holmes, Independent Executrix, on behalf of the Estate of Harry Holmes, deceased, hereafter called Respondent, files this her petition for rehearing and would respectfully show to the Court:

Statement

The Court's opinion, decided January 2, 1946 (66 S. Ct. 527), when considered in the light of its effect, holds:

(1) That the contingencies are subject to change.

(2) That the primary estates (not subject to change) have *no value.*

(3) That the contingencies *have a value* not trivial.

(4) That the primary estates in the corpus, although not subject to change, alteration or revocation, are nevertheless includible for tax purposes.

I.

Although we disagree as to legal correctness, the Court may, without violence to any of our fundamental concepts of justice, conclude that in its opinion the contingencies, being subject to elimination, are subject to change of enjoyment within the meaning of the Act.

But the Court has failed to even discuss the most important question in the case which is that the primary estates (title to the corpus in certain persons living at the end of fifteen years) are *not subject to change in enjoyment but have been included for tax purposes.*

The Court has therefore committed very grievous error —either in completely disregarding this question or in finding that as a matter of fact (contrary to the record and the implied findings of the lower courts) these primary estates had *no value* at the time of decedent's death.

The Trustee might (under the Court's reasoning) have *added to* the primary estates by eliminating all contingencies, but could not have *detracted from* such primary estates or *changed* them from one beneficiary to another.

Respondent earnestly urges that regardless of the Court's opinion as to the existence of other powers, these primary estates, not being contingent, should not have been included for tax purposes; and the record is not only sufficient to in-

dicate but very clearly shows that such primary estates had a most substantial value—if not the entire value involved. This Court cannot become a fact finding body particularly when there is no evidence in the record supporting the fact found but where the record is strongly against such fact. DOBSON v. COMMISSIONER, 320 U.S. 489, 64 S. Ct. 239.

Both The Tax Court and the Circuit Court of Appeals obviously considered these estates the only ones having a value worthy of consideration. This Court has completely disregarded them.

We respectfully pray that the Court reconsider its opinion and at least remand the case for a fact determination by the proper tribunal as to the value of these primary estates with instructions that such value, be excepted from the other values, if any, includible in decedent's estate.

II.

Conceding for the purpose of discussion that the contingencies are subject to possible change in enjoyment, the Court's conclusion that as a matter of fact such contingencies are **not trivial** is a finding of fact by the Supreme Court which is not only without support in the record but which is contrary to implied findings by both The Tax Court and Circuit Court of Appeals.

It is submitted that regardless of the Court's opinion, it should have gone no further than to remand the case for findings by The Tax Court as to whether the contingencies in question had a value which could be regarded as more than trivial; and Respondent prays that the Court grant this petition for rehearing and that upon such rehearing the Court at least remand the case with instructions to the proper courts having constitutional authority to determine the fact of triviality *vel non*.

III.

In holding that withholding income under spendthrift provisions or invading corpus for a beneficiary constitutes a power to alter, amend, revoke, or terminate a grant in trust, the Court has in effect said:

> "Any trust in which grantor acts as Trustee will be ineffective for purposes of the estate tax."

Such a rule cannot be found in any Act of Congress (or even in a Treasury Regulation) but under the Court's reasoning, any act of discretion in simple trust management might possibly have the effect of "delaying or speeding" enjoyment and in the event of intervening death of a beneficiary might under the Court's reasoning "change" enjoyment from the dead beneficiary to his heirs or survivors. A trustee without discretion is not a trustee—a "bank account" would be just as powerful and more efficient than a Trustee without discretion.

We do not believe that the court intended to so extend itself and respectfully submit that the Court's opinion should be clarified in this respect.

Respectfully submitted.

J. E. PRICE

J. V. WHEAT

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

J. E. PRICE

J. V. WHEAT

SUPREME COURT OF THE UNITED STATES.

No. 203.—October Term, 1945.

Commissioner of Internal Revenue, Petitioner, *vs.* Estate of Harry Holmes, Deceased, Lucy B. Holmes, Independent Executrix.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 2, 1946.]

Mr. Justice Rutledge delivered the opinion of the Court.

In *White* v. *Poor*, 296 U. S. 98, the question arose whether the power "to alter, amend, or revoke" included the power of a decedent to terminate a trust so as to bring the trust estate within his gross estate for purposes of the transfer tax imposed by § 302(d) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 71. The Court, finding it unnecessary to determine that question, disposed of the case upon another ground. The question is here again, this time inescapably, but with a further legislative history and a somewhat different setting of fact.

In 1936, immediately following the *White* decision, Congress revised § 302(d) by rewriting it into two separate paragraphs relating to "revocable transfers," one applying to transfers after June 22, 1936, the other to transfers on or prior to that date. These are now §§ 811(d)(1) and (2) of the Internal Revenue Code, which are set forth in the margin.[1] For present purposes the dif-

[1] "Sec. 811. Gross Estate. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

"(d) Revocable transfers.—(1) Transfers after June 22, 1936.—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death.

"(2) Transfers on or prior to June 22, 1936.—To the extent of any interest therein of which the decedent has at any time made a transfer, by

ference claimed to be important consisted in changing the phrase "to alter, amend, or revoke" applying to transfers on or prior to June 22, 1936, so that in § 811(d)(1) it reads "to alter, amend, revoke, or terminate," as to transfers after that date.

However § 811(d)(2) governs the transfer in this case, since it was made in January, 1935, prior to the dividing date. And the question most mooted has been whether the change was one of substance or was only a clarifying amendment. Put differently, the principal issue is whether power to "alter, amend or revoke" included power merely to terminate the interests created by the trust or required some further change.

The Tax Court and the Circuit Court of Appeals for the Fifth Circuit, one judge dissenting, have ruled that the change was substantial, not merely declaratory. 3 T. C. 571; 148 F. 2d 740. Accordingly they have held that no deficiency resulted from the taxpayer's failure to include the value of the trust estate created by the decedent Holmes in his gross estate for estate tax purposes. The Commissioner maintains the contrary view. Because of alleged conflict with decisions from other circuits,[2] certiorari was granted. — U. S. —.

We think the Tax Court and the Court of Appeals were in error in their view of the statute's effect.

The facts were stipulated. In so far as necessary to state, they are as follows. On January 20, 1935, by a single trust indenture Holmes created three several irrevocable trusts, one for each of three sons then aged 22, 19 and 14 years respectively. Each was given the beneficial interest in one-third of a common fund consisting of corporate stock later converted into other assets.[3] The three trusts were identical in terms. Holmes was named and acted as trustee until his death October 5, 1940.

---

trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a transfer shall be included in the gross estate under paragraph (1) unless it is includible under this paragraph." 26 U. S. C. § 811.

[2] Mellon *v.* Driscoll, 117 F. 2d 477 (C. C. A. 3); Commissioner *v.* Hoffheimer's Estate, 149 F. 2d 733 (C. C. A. 2). See also the authorities cited in note 11 *infra*.

[3] The corporation which had issued the stock was liquidated and the corporate assets were transferred to the trust to replace the stock.

Each trust was to continue for a period of fifteen years, unless earlier terminated under power reserved to the grantor, or for a longer term on specified conditions summarized below. But the grantor reserved to himself during his lifetime the power to terminate any or all of the trusts and distribute the principal, with accumulated income, to the beneficiaries then entitled to receive it.[4] He retained no power to revest in himself or his estate any portion of the corpus or income.

Various provisions for disposition over were made to cover contingencies created by the death of beneficiaries during continuance of the trust. Generally stated, the scheme was that the surviving issue of each son should take his share of the corpus, receiving it share and share alike, unconditionally if over 21; as beneficiaries until attaining that age, if under it. If a son should die without issue, his "share or trust" was to go "pro rata" to the other two sons, or their surviving issue *per stirpes;* if either other son should be dead without issue, the survivor or his issue was to take the whole; and if all the sons should be deceased without issue, whatever might remain in the trust estate was given to the grantor's wife, if living; if not, to her heirs at law. The trust was to terminate in any event upon the death of the last survivor of the three sons and the expiration of twenty-one years thereafter.

The trustee was given broad discretionary power to apply each beneficiary's share of the corpus for his maintenance, welfare, comfort or happiness, with a precatory suggestion of liberality.

The income was subject to spendthrift provisions and discretionary power of accumulation. If not accumulated, it was to be distributed to the beneficiary, preferably in monthly instalments.

The principal contention is that the sum of the various provisions

[4] The power of termination was reserved by paragraph eleven of the indenture, as follows:

"Grantor, during his lifetime, and my son or sons herein named, while acting as Trustee hereunder, may, if deemed advisable by them as Trustee, distribute to either of Grantor's children, the whole or any part of the principal of their respective trusts, and their interests thereunder. And Grantor may, during his life-time, if deemed advisable by him, and my son or sons herein named, while acting as Trustee hereunder, may, if deemed advisable by them as Trustee, terminate either or all of said trusts herein created for the respective benefit of my said sons, and distribute the principal of the trust to the persons entitled to receive the same under the terms hereof on the date of such termination."

It seems questionable on the wording that the grantor's power of termination, like that of his sons, was limited by the clause "while acting as Trustee hereunder." See note 13 and text.

was to create or reserve to the decedent only a power to accelerate in time the enjoyment of the beneficial interests brought into being by the trusts; that these were vested interests; that no power was reserved to revest them or any of them in the donor or his estate or to change or alter them, or the terms of the gifts, in any manner other than by mere acceleration of enjoyment; and that the powers thus reserved are not sufficient to bring the trust estate, or any part of it, within the coverage of § 811(d)(2).[5]

This view presupposes two things. One is that termination of contingencies upon which enjoyment is dependent does not "change, alter, or revoke" enjoyment; the other, that the power "to alter, amend, or revoke" specified in § 811(d)(2) does not include a power to terminate contingencies which accelerate enjoyment, with the effect of making certain that the beneficiary taking will have it rather than others to whom it would or might inure if termination were longer deferred.

One difficulty with respondent's position is in its conception of "enjoyment." More than once recently we have emphasized that "enjoyment" or "enjoy," as used in these and similar statutes, are not terms of art, but connote substantial present economic benefit rather than technical vesting of title or estates. Cf. *United States* v. *Pelzer*, 312 U. S. 399, 403; *Fondren* v. *Commissioner*, 324 U. S. 18, 20; *Commissioner* v. *Disston*, 325 U. S. ——.[6] In this sense it is clear that none of the sons here had a present right to immediate enjoyment of either income or principal, see *Commissioner* v. *Disston*, *supra*, although each may have been invested with what respondent regards as a "fee simple" in an equitable interest, subject to divestment by the contingency of the beneficiary's death during continuance of the trust. So long as it continued—and it might continue for the life of the survivor of

[5] The taxpayer asserts that each son acquired, on execution of the indenture, "a fee simple title to one-third of the trust corpus and income," subject only to the trustee's power of management for 15 years at the most and to the son's living until this power should end. The reserved power of termination, it is said, applies only to the several contingencies which might affect the time of enjoyment, but not enjoyment itself.

[6] It is true that this case is not one involving the taxability of gifts of "future interests in property" as was true of the cases cited. It is likewise true that the laws relating to estate taxes and those relating to gift taxes are not completely reciprocal. Estate of Sanford v. Commissioner, 308 U. S. 39; Smith v. Shaughnessy, 318 U. S. 176. But there can be no difference in the meaning of the words "enjoyment" and "enjoy" as they are used in the pertinent statutory provisions respectively.

the three sons and 21 years—it could not be said with assurance that any of the sons, or his issue, would come into present enjoyment of his share, or any part of it; for in connection with the possible occurrence of many contingencies, including the grantor's death and his earlier exercise of the power of termination, it is to be recalled that the grantor reserved to himself, while acting as trustee, the power to accumulate the income.

It seems obvious that one who has the power to terminate contingencies upon which the right of enjoyment is staked, so as to make certain that a beneficiary will have it who may never come into it if the power is not exercised, has power which affects not only the time of enjoyment but also the person or persons who may enjoy the donation. More therefore is involved than mere acceleration of the time of enjoyment. The very right of enjoyment is affected, the difference dependent upon the grantor's power being between present substantial benefit and the mere prospect or possibility, even the probability, that one may have it at some uncertain future time or perhaps not at all. A donor who keeps so strong a hold over the actual and immediate enjoyment of what he puts beyond his own power to retake has not divested himself of that degree of control which § 811(d)(2) requires in order to avoid the tax.

But the respondent relies heavily upon the legislative history and the continued use of "alter, amend, or revoke" in the 1936 revision, which at the same time introduced "or terminate" to govern future transactions, as expressive of intention to differentiate the two classes of transfers. This view puts emphasis on the meaning of "revoke" rather than of "enjoyment," and excludes from that term's scope a power not amounting to more than one of termination.

We think the history gives the opposite story. The 1936 revision resulted from the *White* decision, which raised doubt whether Congress had included the power to terminate in the words "alter, amend, or revoke." To clarify the matter Congress removed all doubt for the future by enacting § 811(d)(1). At the same time it adopted § 811(d)(2), which retained the earlier phrasing. This was from concern that retroactive application of § 811(d)(1) should not impose taxes on prior transfers not comprehended by the prior law, as the concluding sentence of § 811(d)(2) shows.[7] Notwithstanding this and the doubt

[7] See note 1.

created by *White* v. *Poor, supra,* the report of the Committee on Ways and Means of the House of Representatives expressly states that the addition of "or terminate" in § 811(d)(1) was "declaratory of existing law."[8] Administrative interpretation, including Treasury Regulations, support this view,[9] which also is either followed or indicated in decisions of the Circuit Courts of Appeals, except the one now in review.[10] As we have pointed out, that view is more consonant with the structure and interpretation given concomitant taxing act provisions. For all these reasons, we think it must prevail.

Respondent's other contentions require only brief notice. The contingencies here were too numerous and too important in their effects not only upon the time but also upon the right of immediate enjoyment for them to be regarded as trivial or inconsequential, as respondent urges. Decedent's failure to reserve for himself any beneficial interest or power to recapture one is not controlling. *Porter* v. *Commissioner,* 288 U. S. 436. Nor is the fact that he could not select new beneficiaries outside those comprehended by the indenture, and was therefore limited to changing enjoyment among that group.[11]

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[8] The report stated: "Another change made in subsection (a) of section 206 has been to expressly include a power to terminate along with the powers to alter, amend, or revoke. In the case of *White* v. *Poor, supra,* the Supreme Court did not pass on the question of whether the power to terminate was included in the language relating to a power 'to alter, amend or revoke.' Since in substance a power to terminate is the equivalent of a power to revoke, this question should be set at rest. Express provision to that effect has been made and it is believed that it is declaratory of existing law." H. Rep. No. 2818, 74th Cong., 2d Sess. 10. The report was issued in connection with H. R. 12,793, of the same session, of which § 206 contained the changes later enacted, without presently material difference, as § 805 of the Revenue Act of 1936, now § 811(d) of the Code.

[9] See Treasury Regulations 105, § 81.20, stating: "Such addition is considered but declaratory of the meaning of the subdivision prior to the amendment. A power to terminate capable of being so exercised as to revest in the decedent the ownership of the transferred property or an interest therein, or as otherwise to inure to his benefit or the benefit of his estate, is, to that extent, the equivalent of a power to 'revoke,' *and when otherwise so exercisable as to effect a change in the enjoyment,* is the equivalent of a power to 'alter.'" (Emphasis added.)

[10] Cf. the authorities cited in note 11.

[11] Chickering v. Commissioner, 118 F. 2d 254; Commissioner v. Hoffheimer's Estate, 149 F. 2d 733; Commissioner v. Bridgeport City Trust Co., 124 F. 2d 48; Guggenheim v. Helvering, 117 F. 2d 469; Commissioner v. Chase National Bank, 82 F. 2d 157; Union Trust Co. of Pittsburgh v. Driscoll, 138 F. 2d 152; Millard v. Maloney, 121 F. 2d 257; Mellon v. Driscoll, 117 F. 2d 477; Holderness v. Commissioner, 86 F. 2d 137.

It seems suggested that the power of termination was reserved to the grantor, not in the capacity of donor, but only in that of trustee, from which the conclusion appears to be drawn that no power of termination was reserved within the meaning of § 811(d)(2). As we have noted,[12] the eleventh paragraph of the indenture is not wholly clear concerning the premise. But in terms the reservation is to "the grantor, during his lifetime" and grammatical construction of the second sentence seems to indicate the qualifying clause "while acting as trustee hereunder" was intended to apply only to the decedent's son or sons acting in that capacity.[13] If the question has been saved, we cannot say upon this language that the grantor did not reserve the power of termination to himself as donor rather than merely as trustee. It is unnecessary therefore to determine whether, if the reservation were different, the variation in wording between §§ 811(d)(1) and (2) in this respect would be material.[14] We have considered respondent's remaining contentions and find them without merit.

The judgment of the Court of Appeals is reversed and the cause is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Mr. Justice DOUGLAS dissents.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

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[12] Note 4.

[13] *Ibid.* The parenthetical phrase "(in whatever capacity exercisable)" was added to § 811(d)(1) at the same time as "or terminate," and possibly also as a consequence of the decision in White *v.* Poor. Although the legislative reports are not clear, see H. Rep. No. 2818, 74th Cong., 2d Sess. 9, this change also has been held to have been declaratory of existing law. Welch *v.* Terhune, 126 F. 2d 695; Union Trust Co. of Pittsburgh *v.* Driscoll, 138 F. 2d 152; see also Treas. Reg. 105, § 81.20; Estate of Nettleton *v.* Commissioner, 4 T. C. 987.

[14] See the preceding note.